85-1308

NO.

IN THE

Supreme Court, U.S.
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# Supreme Court of the United States

OCTOBER TERM, 1986

FRANK GERACE and FRANK MATERIO,
Petitioners,

v.

STATE OF NEW JERSEY CASINO CONTROL COMMISSION
and
STATE OF NEW JERSEY, DEPARTMENT OF
LAW AND PUBLIC SAFETY, DIVISION OF
GAMING ENFORCEMENT,
Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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January 30, 1986

## QUESTIONS PRESENTED

1. Whether the New Jersey Casino Control Commission violated two union officials' First Amendment right to freedom of association when the agency expressly found that the officials committed no improprieties and no illegal acts, but nevertheless ordered them to resign because the agency feared that their association with a reputed member of organized crime might result in future acts of misconduct.

2. Whether section 86(f) of the Casino Control Act is unconstitutionally vague on its face and as applied because an individual of ordinary intelligence does not have adequate notice of who is a "career offender" and what conduct is prohibited by the Act.

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NO. 86

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

FRANK GERACE and FRANK MATERIO,
Petitioners,

v.

STATE OF NEW JERSEY CASINO CONTROL COMMISSION
and
STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Petitioners Frank Gerace and Frank Materio respectfully request that a Writ of Certiorari be issued to review the judgment of the New Jersey Supreme Court, entered on November 1, 1985, which

denied Certification from the decision of the New Jersey Superior Court, Appellate Division. The New Jersey Superior Court, Appellate Division upheld the decision and judgment of the State of New Jersey Casino Control Commission.

## OPINIONS BELOW

The judgment order of the New Jersey Supreme Court, not yet reported, appears in the Appendix. ( 1a ). The unreported opinion of the New Jersey Superior Court, Appellate Division, appears in the Appendix. ( 3a ). The unreported opinion of the New Jersey Casino Control Commission appears in the Appendix. (112a ).

The opinions of the United States Supreme Court United States Court of Appeals for the Third Circuit and District Court for the District of New Jersey in earlier related proceedings in this case are reported under the caption Hotel & Restaurant Employees & Bartenders International Union Local 54 v. Danziger, 536 F. Supp. 317 (D.N.J. 1982, rev'd, 709

F.2d 815 (3d Cir. 1983), vacated, 104 S. Ct. 3179 (1984).

## JURISDICTION

The judgment of the New Jersey Supreme Court was entered on November 1, 1985. This petition for certiorari was filed within ninety days of that date. This Court has jurisdiction to review the judgment of the New Jersey Supreme Court by writ of certiorari pursuant to 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

> Congress shall make no law...abridging the freedom of speech...

AMENDMENT XIV. Section 1

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;...

## STATUTORY PROVISION INVOLVED

Section 86(f) of the New Jersey Casino Control Act; N.J.S.A. 5:12-86(f) Casino License - disqualification criteria:

The Commission shall deny a casino license to any applicant who is disqualified on the basis of any of the following criteria:

> f. The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State. A career offender cartel shall be defined as any group of persons who operate together as career offenders:

## STATEMENT OF THE CASE

Petitioner Frank Gerace is the ex-President of the Hotel and Restaurant Employees and Bartenders International Union Local 54 ("Local 54"). Petitioner Frank Materio is a business manager at Local 54. This civil matter involves Petitioners' disqualification by the Casino Control Commission (the "Commission") pursuant to section 86 of the Casino Control Act (the "Act"). Section 86 sets out the criteria under which an applicant will be denied a license. Petitioners Gerace and Materio

were disqualified under section 86(f) of the Act as a result of what the Commission found was their "association" with Nicodemo Scarfo, an individual the agency determined to be a "career criminal offender." According to the Commission, this association was "inimical to the policies of the Act."

1. THE COMMISSION PROCEEDINGS

After an investigation conducted by its enforcement arm, the Division of Gaming Enforcement (the "Division"), the Commission held public hearings on Petitioners' qualifications from June to September, 1982. The Commission issued its final disqualification decision on September 28, 1982.

a. The Majority Opinion

The majority disqualified Gerace based on five general areas of evidence:

First, Scarfo kept Gerace's name on his telephone list in code. The Commission, however, stated that this fact demonstrated nothing more than Scarfo's interest in the union and his desire to keep it secret. ( 135a).

Second, the Commission noted that Gerace put

up $10,000 in bail for Scarfo. ( 140a ). In fact, in a transaction that was completely open and legitimate, Gerace loaned his mother $10,000. (32a, 140a). Mrs. Gerace gave this money -- in addition $10,000 of her own funds -- to her best friend, Mrs. Scarfo, so that her son could obtain bail. Gerace admitted that he knew what his mother intended to do with the money. Nevertheless, Gerace acted as he did because he was beholden to his mother.

Third, the Commission relied on the immunized testimony of Joseph Salerno, a self-confessed "gangster" ( 146a ) and accomplice to a murder ( 146a ). Indeed, Salerno admitted that he associated with persons whom he believed were gangsters so that he could share in the "glamour" and "glory" and economic benefits. Salerno was the only witness who linked Scarfo to Local 54. Salerno testified before a United States Senate Subcommittee that Scarfo controlled the day to day affairs at Local 54 and that he overheard Scarfo and Gerace discussing union business. (34a). On cross-examination before the Commission, how-

ever, Salerno admitted that he never overheard any conversation between Gerace and Scarfo and never heard them say anything to each other about Local 54, "and had merely assumed that they discussed union business." ( 149a )(emphasis added). Salerno also admitted that Scarfo lied to him about all matters of significance. ( 150a). Therefore, Petitioners argued that Salerno's testimony added nothing to the finding of organized crime influence on Gerace.

Fourth, although the Commission found that Gerace appointed to union positions persons known to Scarfo, the agency conceded that: "the record is silent as to whether any of the Scarfo-related appointees have acted illegally or otherwise improperly in the conduct of the Local's affairs...." ( 199a ). More importantly, the New Jersey State Police Officer in charge on the Division's investigation of Local 54 admitted in his deposition testimony that there was no evidence that these appointments were the result of Scarfo's influence.

Fifth, the Commission cited four disputed

business dealings between Local 54 and alleged Scarfo associates. The union, however, only played a role in two of these contracts, about which the Commission found "no evidence... of any irregularities" in the way they were obtained or performed for Local 54. ( 170a ). Indeed, the Commission conceded that each of the disputed business dealings were entirely legitimate and devoid of any irregularity. ( 170-175a).

The Commission conceded that the evidence against Materio was even more circumstantial than the evidence against Gerace. Indeed, the Commission stated that in "Materio's case, we do not have the evidence of direct, frequent contact with Scarfo...." ( 203a ). Moreover, in a deposition answer that was given great emphasis by Petitioners before the Appellate Division, the head of the Division's unit investigating Local 54 revealed that he was unaware of any facts, communications or transactions which indicated that Scarfo, through his alleged association with Materio, had exercised influence on the affairs of Local 54.

As to Materio, the Commission relied on the

following three pieces of evidence:

First, Scarfo kept Materio's name on his telephone list. Like Gerace, the Commission recognized that this fact demonstrated nothing more than Scarfo's interest in the union. (135a ).

Second, Materio helped Scarfo make bail. Like Gerace, Materio contended that he did this as a favor to Katherine Scarfo, whom he knew for approximately twenty years. ( 142a ). Although perhaps ill-advised, Materio's conduct did not establish influence by Scarfo.

Third, the Commission credited the testimony of Joseph Salerno concerning a conversation between a union official and a Scarfo associate that involved a scheme to defraud the union. ( 154a ). The Commission accepted Salerno's testimony that Materio overheard this conversation -- but said nothing. ( 154a ). Materio, however passed a polygraph examination that tested his assertion that he was not present during the alleged conversation and never overheard it. (36a). In addition, even if Salerno's testimony was true, the Commission conceded that the scheme was never

acted upon and never even involved Materio. ( 154a ). Therefore, Petitioners argued that this evidence was irrelevant.

Despite the ambiguity of the evidence, the Commission found that Petitioners were "influenced" by Scarfo, whom the agency concluded was a "career offender." The Commission, however, conceded that there was no direct evidence of influence and, indeed, not even any evidence of improprieties in the way Petitioners conducted union business. ( 199a ). Moreover, the agency stated that the evidence was "uncontradicted" that "Gerace and Local 54 were effective and honest employee representatives." ( 189a ). Despite the fact that there was no evidence of any improprieties, the Commission disqualified Petitioners because it stated that the "number" of alleged Scarfo associates with "ties" to the union could not be a mere "coincidence." ( 200a ). Therefore, the Commission disqualified Petitioners because it sought to prevent future wrongdoing that it predicted might occur.

b. The Dissenting Opinion

Commissioner Joel R. Jacobson vigorously dissented from the majority's conclusion that the record established actual influence. Commissioner Jacobson wrote:

> "... there has been no reliable or substantial evidence before this Commission of any influence, any impropriety, or any crime." ( 247a) (emphasis added).

Commissioner Jacobson charged the majority with discarding the presumption of innocence and disqualifying Petitioners based on "guilt-by-association." ( 249a ). The Commissioner also asserted that the majority disqualified Appellants to prevent future influence and characterized the majority's opinion as an "abandonment of American democratic traditions." ( 248a ). Commissioner Jacobson stated:

> "The conclusion one must reach is that the majority believes that while the Scarfo influence on Local 54 cannot be proved by hard evidence today, there is always the possibility that his association with Gerace and Materio could be "inimical" at some point in the future. If this is the logic of the disqualification order, it is based upon an abandonment of American democratic traditions. (248a). (emphasis added).

Commissioner Jacobson asked:

> Are we to condemn an innocent individual today, because at some distant future time, he may commit an impropriety?" (249a). (emphasis added).

c. The Commission's Order Sanctioning Local 54

As noted, the Commission issued an opinion, dated September 28, 1982, in which it found that Petitioners were disqualified under section 86(f) of the Act. The Commission also issued an order which: 1) required Petitioners removed from their union positions by October 12, 1982; and 2) stated that, pursuant to section 93 of the Act, if Petitioners were not removed by that date, Local 54 would be prohibited from collecting dues from workers in the casino industry. N.J.S.A. 5:12-93.

2. RELATED FEDERAL COURT PROCEEDINGS AND THE COMMISSION'S SUPPLEMENTAL ORDER SANCTIONING PETITIONERS

Prior to the Commission's evidentiary hearing and disqualification decision, Local 54 sought a preliminary injunction in the United States District Court of the District of New Jersey. This Motion was denied on March 22, 1982. Local 54 appealed the District Court's Order to the United

States Court of Appeals for the Third Circuit.[1] On June 6, 1983, the Third Circuit Court of Appeals issued a 2-1 decision holding that the disqualification standards for union representatives and the dues collection ban established by N.J.S.A. 5:12-93 were both preempted by Section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973). See Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danzinger, 709 F.2d 815 (3d Cir. 1983).

The State of New Jersey appealed the ruling of the Third Circuit to the United States Supreme Court. On July 2, 1984, the United States Supreme Court vacated the judgment of the Court of Appeals and held that Section 93 of the Act is not preempted by Federal labor laws to the extent that

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1. After the Commission issued its decision in September 1982 -- and while the appeal from the district court's denial of the preliminary injunction was pending in the Third Circuit -- the district court on October 1, 1982 issued an order enjoining the Commission from enforcing the Section 93 sanctions against Local 54 pending the outcome of the federal court appeal.

it imposes certain limitations on casino industry employees' choice of whom may serve as their collective bargaining representative. Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54, 104 S. Ct. 3179 (1984). In dicta, this Court stated that the "Act... apparently grants broad powers to the Commission to impose sanctions directly on disqualified persons.... 104 S. Ct. at 3191. (emphasis added).

Following this Court's suggestion, on September 12, 1984, the Commission withdrew its decision to impose the dues collection sanction. In its place, the Commission issued an order directing sanctions at Petitioners as individuals -- as opposed to its previous order sanctioning the union -- if Petitioners were not removed from their union positions. Petitioners subsequently submitted their resignations to the union's executive board.

3. PROCEEDINGS IN THE NEW JERSEY SUPERIOR COURT, APPEALLATE DIVISION

On July 11, 1985, an Appellate Division panel of three judges unanimously affirmed the Commission's decision. First, the Appellate Division

considered Petitioners' contention that there was insufficient credible evidence to support the Commission's finding of Scarfo's alleged "influence" upon their union activity. Petitioners argued that if Scarfo was indeed a "career criminal offender", than any "influence" he exerted on Petitioners would have inherently resulted in -- at the very least -- some form of questionable conduct. Because the Division's investigation -- spanning almost three years and costing hundreds of thousands of dollars -- found no evidence of any impropriety, Petitioners argued that the only reasonable inference was that there was no Scarfo influence at work upon them. In short, Petitioners asked the Appellate Division to adopt Commissioner Jacobson's finding that "... there [was] no reliable or substantial evidence before [the] Commission of <u>any influence</u>, <u>any impropriety</u>, <u>or any crime</u>." ( 247a ). (emphasis added).

Like the Commission, however, the Appellate Division found that the "sheer number of ties to Scarfo renders incredible an innocent explanation." ( 38a). Therefore, like the Commission, the

Appellate Division considered the quantity of the evidence without examining the quality of the evidence in determining that the Commission's findings of fact were supported by sufficient credible evidence.

Second, the Appellate Division considered Petitioners' contention that the Commission violated their First Amendment freedom of association. Petitioners argued that the agency violated their constitutional rights by ordering them to resign from their union positions due to an association with a reputed member of organized crime that the agency conceded did not result in any improprieties or illegal conduct. Petitioners claimed that they were penalized because the State agency found the disputed association distasteful and feared it would result in some future improper conduct.

The Appellate Division reviewed the relevant case law, including Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984), concluding that "courts have expanded the right to [freedom of association to] include associations with no overtly political purpose." ( 41a ). The Court stated, however, that "[a]lthough Roberts

has expanded the right of association to encompass both 'expressional associations,' and certain 'intimate human relationships', that case has not raised to the level of First Amendment protection every social relationship which may exist in a society." ( 50a )(quoting Roberts, 104 S. Ct. at ). In light of Petitioners' claim that their association with Mr. Scarfo was purely social, the Appellate Division assumed "arguendo" that Petitioners relationship with Scarfo was protected by the First Amendment. ( 50a ).

The Appellate Division therefore considered whether -- because the "First Amendment right of association is not absolute" ( 51a ) -- the State of New Jersey's infringement on Petitioners' right of association was justified by a compelling State interest. Petitioners conceded that the State has a compelling interest in "keeping organized crime out of unions representing casino employees." ( 51a ). Petitioners, however, claimed that the State interest was not sufficient to infringe upon their freedom of association unless there was evidence of some impropriety -- not the fear of future

acts of misconduct. ( 52a).

Rejecting Petitioners' argument, the Appellate Division held that the Commission demonstrated a compelling interest "in protecting the casino industry... justif[ying] any associational infringement resulting from the disqualification of Gerace and Materio." ( 55a ). According to the Appellate Division, "the operative question is not whether the associations between Gerace, Materio and Scarfo are lawful or ethical, but rather what impact such associations have on the policies intended to be served by casino gaming regulation." (55a).

Third, the Appellate Division considered the claim that section 86(f) was unconstitutionally vague on its fact and as applied to Petitioners. Petitioners argued that the statute failed to provide any notice as to who was a "career offender" or as to the meaning of an "inimical" association. Petitioners asked -- as applied to them -- when did Nicodemo Scarfo become a career offender? Considering that until 1983 Scarfo was permitted to gamble and receive "complimentary" privileges at

the casinos, Petitioners also asked, how were they to have known in 1982 -- when they were disqualified -- that their association with him was prohibited by the Act?

In response to the vagueness challenge, the Court held that section 86(f) was constitutional on its face because "[c]ourts have repeatedly upheld, as against vagueness challenges, criterion less definite than that challenged here." (63a). The Court specifically relied on In re Boardwalk Regency Casino Application, 180 N.J. Super. 324, 345-47 (1981) modified 90 N.J. 361 (1982). According to the Appellate Division, the "disqualification standard of N.J.S.A. 5:12-86(f) as interpreted and refined by the Commission, is at least as definite and validly applicable to certain types of conduct as was the

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2. The Appellate Division noted that Petitioners' vagueness challenge to the term "inimical" was rejected by the United States District Court in Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danziger, 536 F. Supp. 317 (1982).

"good character" standard approved of in Boardwalk Regency." ( ).

The Appellate Division further held that the application of the section 86(f) term "inimical... association" to Petitioners was not unconstitutional. The Appellate Division stated that Petitioners should have known from the "press" that "Scarfo was not a highly reputable citizen." (67a). Moreover, the Court stated that the fact that Scarfo had been charged with homicide -- a crime of which he was acquitted -- "should have warned [Petitioners] of Scarfo's possible exclusion from the gaming industry." (67a).

4. PROCEEDINGS IN THE NEW JERSEY SUPREME COURT

On August 23, 1985, Petitioners filed in the New Jersey Supreme Court a timely Notice of Appeal from the decision of the New Jersey Superior Court, Appellate Division. The Notice of Appeal stated that "[t]his appeal is being prosecuted pursuant to R. 2:2-1(a)(1) with respect to the Casino Control Commission's decision to disqualify Mr. Geraace and Mr. Materio under the Casino Control Act

due to a 'social association' in violation of the First Amendment of the Federal Constitution."

On July 31, 1985, Petitioners filed in the New Jersey Supreme Court a timely Petition for Certification, which asked the Court to exercise its discretionary power of review pursuant to R. 2:12-4 to determine, inter alia, whether section 86(f) was "unconstitutionally vague on its face and as applied."

On November 1, 1985, the New Jersey Supreme Court filed an order denying the Petition for Certification (1a). Pursuant to R. 2:12-9, The Court's order dismissed the appeal filed on the First Amendment issue.

## REASONS FOR GRANTING THE WRIT

The clear cut legal questions presented by this precedent setting litigation are precisely the type of controlling issues that warrant review by this Court. The statute involved in this matter directly affects the power of a State to force freely elected union leaders to involuntarily resign -- not because they commit crimes; not because they commit improprieties; and not because they

perform poorly. Rather, section 86(f) of the Act empowers the State of New Jersey to dismiss freely elected union leaders solely because they associate with individuals the State deems disreputable. Therefore, unless this Court reviews the decision of the Commission and New Jersey Courts, the State of New Jersey will have the precedent of this case to deny individuals their union positions and a union its chosen leaders simply because it determines there is a "risk" of future harm to the public in their disputed associations. (Point I).

In particular, the instant matter offers this Court an opportunity to clarify the scope of an individual's right to freedom of association that was set out most recently in Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984). In Roberts, this Court confirmed that the concept of the First Amendment freedom of association has been expanded to include associations that do not necessarily involve the advancement of beliefs and ideas. Petitioners contend that their disputed association is protected under the right this Court labelled "free-

dom of intimate association." Roberts, 104 S. Ct. at 3249-3250. (Point IA).

In addition, the decision of the New Jersey courts demands review by this Court so that a more precise standard of state interest can be articulated. In Roberts, this Court unambiguously stated that the freedom of association is not absolute, but rather may be infringed if necessary to serve "compelling state interests." Roberts, 104 S. Ct. at 3252. Petitioners contend that this Court must reverse the decision of the New Jersey courts that their State could sufficiently justify the infringement of Petitioners' freedom of association based on the need to prevent future acts of misconduct. This State interest -- which is of course legitimate -- is not "compelling" when the individuals whose rights are infringed -- have by the State's own admission -- never committed any prior act of misconduct. (Point IB).

Finally, the decision of the New Jersey courts that the term "inimical... association" is not unconstitutionally vague conflicts with its own

prior decisions. Petitioners contend that this statutory language failed to give fair warning as to what associations are not permitted under the Act. According to the New Jersey Courts, however, this language is not only constitutionally precise, but because Petitioners "should have known" from "press reports" that their association with Scarfo was impermissible under the Act, the statute is constitutional as applied to them. If permitted to stand, this construction of due process will allow a State to substitute phantom notice from unconfirmed assertions in the press with constructive notice from clear and understandable statutory language that reasonably apprises a person of what conduct is improper. (Point II).

In view of the general importance of the issues to union officials throughout the country, and in view of the need for further guidance from this Court as to the scope of the freedom of association that was expanded in Roberts, review of this case at this time is fully warranted.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER THE STATE OF NEW JERSEY VIOLATED TWO UNION LEADERS' FIRST AMENDMENT RIGHT OF ASSOCIATION WHEN IT FORCED THEM TO RESIGN BECAUSE OF THE STATE'S FEAR THAT THEIR ASSOCIATION WITH A "CAREER CRIMINAL" MIGHT RESULT IN FUTURE ACTS OF MISCONDUCT

The Commission disqualified Petitioners due to their social association with an individual whom the State found was a "career criminal." According to the State, this individual exercised a corrupting influence on Petitioners that might have led to some form of future improper conduct. The First Amendment, however, protects social associations -- even if they do not involve the advancement of political ideas -- as long as the relationship involves no illegality or misconduct. Petitioners contend that their disputed relationship is therefore protected because the Commission conceded that it involved no illegality or even any misconduct. ( 199a ). Petitioners' disqualification must be vacated because: 1) the Commission infringed on their constitutionally protected freedom of association. (Point IA); and 2) the infringement cannot be justified by a sufficiently compelling State interest (Point IB).

A. Petitioners' Disputed Association Is Protected By The Expanded Right To Freedom Of Association

The Constitution protects the freedom to associate as a right peripheral to and supportive of the exercise of other rights guaranteed by the First Amendment. Griswold v. Connecticut, 381 U.S. 479, 483 (1965); NAACP v. Alabama, 357 U.S. 449, 462 (1958). Many of the cases that have discussed the freedom of association have arisen in the context of speech or political activity that is the core of the First Amendment. NAACP v. Alabama is such a case.[3] The bounds of the freedom of association, however, have gradually been expanded to include purely social and personal associations.

This Court recently confirmed the expansion of the limits of the freedom of association in Rob-

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3. In NAACP v. Alabama, the United States Supreme Court struck down a state-imposed requirement that the names of members of a politically unpopular group be made public. This Court stated that the law unacceptably retarded the group's advocacy of political and legal change. 357 U.S. at 462-63.

erts v. United States Jaycees, 104 S. Ct. 3244 (1984). Roberts expressly recognized that the Constitution protects freedom of association "in two distinct senses." Id. at 3249.

In the first sense, NAACP v. Alabama and its progeny recognize a "right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion." Id. at 3249. This Court stated that these decisions protect what it labeled the "freedom of expressive association."

In the second sense, the more recent line of decisions recognize that "certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Id. This Court stated that these decisions protect what it labeled the "freedom of intimate association."

The notion set out in the Jaycees case that the Constitution protects "intimate associations" is

reinforced by Eleventh Circuit's 1984 decision in Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984). The Wilson case further confirmed the expansion of the freedom of association to include protection for social relationships. In Wilson, the Court ruled that "dating is a type of association which must be protected by the first amendment's freedom of association." Id. at 1544. The Court stated:

> "Where two individuals seek to associate with each other, without any evidence of promulgating and advancing political or religious beliefs, they are protected under the freedom of association provision."

Id. The Court held that a state violates the First and Fourteenth Amendments when it seeks "to interfere with the social relationship of two or more people." Id. Applying this principle, the Court held that a police officer could not be fired because of his social association with the daughter of a reputed member of organized crime, even though the association involved contacts with the father. Id. Inasmuch as Wilson stands for the proposition that the Constitution protects a social association with a mobster's daughter, the Commission's dis-

qualification creates the anomolous result that Petitioners can maintain an association with Scarfo's children -- and through that association have contact with Scarfo -- but they cannot have a direct association with Scarfo himself.

Similarly, the Fifth Circuit adopted an expansive view of the freedom of association in Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980). The Sawyer Court concluded that an overly broad anti-loitering statute violated an individual's right of association. In Sawyer, the defendant's "only 'criminal' act was to associate with certain individuals, knowing that they were unlawfully using or possessing illegal drugs." Id. at 316. The Court found that by convicting the defendant for innocent associational activity, the ordinance infringed on his freedom of association. Therefore, Sawyer stands for the proposition that an individual's right to associate encompasses the right simply to meet with other people -- no matter whether the meeting is intended to advance shared beliefs.

Likewise, the Court in McKenna v. Peekskill

Hous. Auth., 497 F. Supp. 1217 (S.D.N.Y. 1980), modified, 647 F.2d 332 (2d Cir. 1981) held that the First Amendment protects associations that are not limited to situations where an advancing of common beliefs occurs. Notably, the court stated that [m]ore recent cases have properly recognized that that the First Amendment also applies to social and personal associations, including those which do not purport to express and advocate ideas." Id. at 1221. In addition, the court stated:

> "This Court agrees that the First Amendment's protection for freedom of association extends to private and social associations, even when the aggregation of persons has no hortatory purpose.... Simply because a group, or even a pair, of persons has not distilled the fruits of their relationship into a body of thought or into a political programme, government interference with their interaction nonetheless implicates the First Amendment."

Id. (emphasis added).

Three cases decided before 1980 also recognized that the First Amendment applies to social and personal associations -- including those that do not involve the advancement of beliefs and ideas. First, in Tyson v. New York City Hous. Auth., 369

F. Supp. 513 (S.D.N.Y. 1974), the Court held that public housing tenants had a cause of action under their constitutionally protected associational rights when they were threatened with eviction because of acts committed by their adult children. The Court stated:

> "The nub of this claim is that by declaring these tenants ineligible for continued occupancy on the basis of their children's acts, the defendants have acted 'solely from the fact of association' by the plaintiffs with their children.... Such a claim, if proven, would run afoul of the First Amendment which guarantees to every person the right to freely associate with others, including members of his family."

Id. at 520 (quoting Fisher v. Snyder, 346 F. Supp. 396, 398 (D.Neb. 1972)) (emphasis added).

Second, in Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970), the Court enjoined a police department from refusing to employ an otherwise qualified individual solely because he belonged to an organization of nudists. The Court stated that it "is too late in the day to doubt that this freedom of association extends only to political or conventional associations and not to the social or the unorthodox." Id. at 65. Although members

of a nudist society might impliedly intend to advance certain beliefs about their values, the Bruns Court found no evidence that such an intent existed. Therefore, the Court decided the case based on the police department's infringement of the disputed individual's mere social and personal association with others. Id. at 66-67.

Third, in Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), aff'd, 476 F.2d 375 (8th Cir. 1973), a public school teacher was terminated because she had male friends of the family as overnight guests, which the School Board characterized as "conduct unbecoming a teacher." In ordering her reinstatement, the Court found that the teacher's right to freedom of association was violated because she was terminated based on "the mere fact of association itself." Id. at 399. Significantly, the Court did not find that First Amendment rights could be distinguished between personal associations and associations involving membership in organizations advancing ideas and beliefs. Id.

Finally, Scales v. United States, 367 U.S. 203 (1961) and its progeny are also relevant in deciding

the limits of the freedom of association. In Scales, the Court determined the constitutionally of the Smith Act, 18 U.S.C. §2385 (1970), which prohibited knowing membership in any organization advocating the overthrow of the government by force. Although the statute punished only knowing membership, the Supreme Court found that mere knowledge of the criminal nature of an organization was an insufficient basis for a conviction. The Court ruled that the statute was constitutional to the extent that it reached "active" members who had both a guilty "knowledge and intent." 367 U.S. at 228. (emphasis added). According to the Court, such a limitation "prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any committment to undertake such action." Id.

Unlike the previously noted cases, Scales concerned an association involving the advancement of political ideas. Nevertheless, Scales is significant because it stands for the proposition that a knowing association with a group cannot be made

a punishable act merely because some of the group members are engaged in criminal conduct. In the instant case, section 86(f) has been construed by the Commission to punish Petitioners not for their own misconduct, but rather for the act of formerly associating with an individual allegedly engaged in criminal activity. Under the principles of Scales and its progeny, however, the punishment of an individual must be predicated upon personal guilt.[4]

The New Jersey Superior Court, Appellate Division reviewed the above canvass of precedent in

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4. Cf. United States v. Robel, 389 U.S. 258, 262 (1967) (striking down an anti-subversive statute on First Amendment grounds because the Act authorized sanctions due to the mere exercise of the right of association, without any consideration of whether the alleged offender shared the organizations' goals); Elfbrandt v. Russell, 384 U.S. 11, 16-17 (1966) (striking down a loyalty oath statute on First Amendment grounds because it authorized penalties based on mere membership in an organization, even if the alleged offender did not subscribe to its illegal purposes).

this area and agreed that the First Amendment freedom of association has been expanded to protect personal associations which do not necessarily involve the advancement of any beliefs -- as long as there is no improper conduct. ( 50a ). Moreover, the Appellate Division cited Roberts for the relevant standard that must be applied to determine whether a disputed association is within the ambit of the freedom of "intimate" association. According to this Court in Roberts, protected social associations "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." 104 S. Ct. at 3250. This Court noted that factors such as "size, purpose, policies, selectivity [and] congeniality" are relevant to the determination of whether the social association is protected. Id. at 3251.

Measured by the criteria of Roberts, Petitioners' contended that their disputed relationship with Scarfo was protected. Petitioners and Scarfo represented a numerically small, selective and

purely personal association involving no strangers. Moreover, Petitioners and Scarfo constituted no more than a small group of individuals having a social relationship.[5] Not surprisingly, the Appellate Division assumed, "arguendo" that Petitioners' relationship with Scarfo was constitutionally protected. ( 50a ).

The State of New Jersey infringed on Petitioners' constitutionally protected association when it forced them to resign their union positions. The State's action is comparable to the constitutional violation in Sawyer v. Sandstrom, where the defendant was punished for having "the wrong kind of friends." 615 F.2d at 313. Such punishment, however, that results from a wholly non-criminal, purely personal relationship, is a

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5. In Roberts v. Jaycees, this Court held that the Jaycees organization fell outside the category of relationships worthy of constitutional protection under the "freedom of intimate association." Crucial to the Court was the fact that the Jaycees were "neither small nor selective" nor intimate. 104 S. Ct. at 3251. In contrast to the Jaycees, Petitioners' disputed association was numerically small and unlike the Jaycees, involved no strangers.

violation of the "freedom of intimate associations," unless it can be justified by a compelling State interest.

### B. The State Failed To Demonstrate A Sufficiently Compelling Governmental Interest

After properly assuming that Petitioners' disputed association was protected within the expanded boundary of the freedom of "intimate" association, the State court held that the Commission demonstrated a sufficiently compelling interest to justify its infringement on Petitioners' rights. According to the Appellate Division, The "State's interest in maintaining the integrity of the casino operations supersedes [Petitioners'] right to freedom of association." ( 55a ). In so holding, the State of New Jersey severely undermined the freedom of association.

Petitioners conceded the interest of the State of New Jersey in keeping organized crime out of unions representing casino employees. ( 51a). Nevertheless, this legitimate State interest does not justify the Commission's infringement on Pet-

itioners' constitutional rights. The Commission did not disqualify Petitioners because they had committed any form of misconduct. Rather, the state agency forced Petitioners to resign because it feared their future acts of misconduct. Petitioners ask this Court to review whether an incalculable risk of future acts of misconduct -- by union officials who were found not to have committed any past acts of misconduct -- can justify the State's infringement on their First Amendment rights.

By merely labelling Scarfo a "career offender" and finding that he had an association with Petitioners, the Commission and State courts avoided the "strict scrutiny" this Court requires to be found in order to justify the infringement of the freedom of association. Roberts v. United States Jaycees, 104 S. Ct. 3244, 3251 (1984); Elrod v. Burns, 427 U.S. 347, 362-63 (1976). Indeed this Court has stated that a "State cannot foreclose the exercise of constitutional rights by mere labels." NAACP v. Button, 371 U.S. 415, 429 (1963). In the instant case, labels substituted

for reasoned analysis. The best evidence of the lack of solid reasoning and fair evaluation of the evidence is the fact that both the Commission and the State courts ignored the most important finding in the case -- the absence of even a single act of misconduct by either Petitioner at any time during their union careers.

The challenged statute is a draconian impediment to the union movement in that it gives the State an absolute veto power over whom union members can choose as their leaders. Thus, the State courts' ruling upholding section 86(f) directly affects several hundred union officials in New Jersey and many thousands of union members. As Commissioner Jacobson stated in dissent, the Commission's application of section 86(f) to disqualify union leaders for fear that they might sometime in the future commit some misconduct is an "abandonment of American democratic traditions." ( 248a ). Petitioners would add to the Commissioner's opinion that the state courts' affirmance of the Commission's action is also an abandonment of the American tradition that union members have

the right to select collective bargaining representatives of their own choosing.

In NAACP v. Alabama, this Court recognized that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. at 460-61 (emphasis added). In this case, by contrast, the Commission's infringement of Petitioners' associational rights received virtually no scrutiny from the New Jersey courts. For this reason alone certiorari should be granted to review the State courts' disregard and apparent misperception of the crucially important and fundamental First Amendment values at issue in this case.

## II. CERTIORARI SHOULD BE GRANTED BECAUSE THE STATUTE UPON WHICH THE STATE OF NEW JERSEY PREMISED ITS ACTION IS UNCONSTITUTIONALLY VAGUE IN THAT IT FAILS TO GIVE NOTICE OF WHAT CONDUCT IS PROHIBITED

The New Jersey courts erred in concluding that section 86(f) is not void for vagueness on its face and as applied to Petitioners.

First, the statute is vague as applied because it afforded no notice to Petitioners that

Scarfo was a career offender. Although Petitioners conceded that Scarfo was a career offender in 1982, they had no way of determining when he took on that status. Since Petitioners did not have notice that Scarfo was a career offender until after the Division sought their disqualifications, they did not have an adequate opportunity to disassociate themselves from Scarfo prior to the Commission's attempt to have them removed from their union offices. Petitioners were therefore trapped by the Act's lack of fair warning.

Second, although section 86(f) is clear in its requirement that something more than an association with an organized crime figure is necessary for the disqualification of a union official, the statutory standard of "inimical" is impermissibly vague on its face. The word fails to provide a person of ordinary intelligence with sufficient notice <u>of what conduct</u> is prohibited. It does not establish the precise measure of intolerable conduct and thus fails to give sufficient notice to a reasonable person. In addition,

the use of the term "inimical" constitutes an impermissible legislative delegation of authority to a state agency because it requires the Casino Control Commission to decide disqualifications on an ad hoc and subjective basis.

In response to Petitioners' claims, the Division argued that notice was provided by "official reports of law enforcement agencies, and by general media publicity." Moreover, the Commission expressly stated that Petitioners should have known that Scarfo was a career offender because of his "notoriety as an organized crime 'boss'". Yet the Division itself admitted that Scarfo did not become an organized crime "boss" until March, 1981 -- only one month before the Division sought to disqualify Gerace and Materio. Therefore, under New Jersey's notion of fair warning, Petitioners had four weeks notice -- supposedly obtained from press reports of Scarfo's ascendancy to the status of "boss" -- to terminate their alleged association with Scarfo.

There is no novelty in finding a statute void on its face where it is couched in terms "so vague

that persons of common intelligence must necessarily guess at its meaning and differ as to its application." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)(quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)). See Coates v. Cincinnati, 402 U.S. 611, 614 (1971); State v. Lashinsky, 81 N.J. 1 (1979). The question is ultimately one of fairness. The court must ask: Should the person challenging the statute have understood that his conduct was proscribed; should he have understood that the penalty to be imposed was the sanction intended by the legislature? In Re DeMarco, 83 N.J. 25 (1980). If this Court finds that the statutory provisions are impermissibly vague, then the alleged conduct complained of is exempt from its prohibitions.

In Grayned v. City of Rockford, 408 U.S. 104 (1972), this Court reviewed the principals that are offended by vague laws and set forth a twofold purpose in requiring that legislation be sufficiently specific. The Court first "insist[ed]" that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Id. at

108-109. Secondly, the Court mandated "explicit standards" for those who apply the statutes so as to avoid "arbitrary and discriminatory" enforcement. Id.

In this case, the specific question is whether a union leader of ordinary intelligence is given fair notice by section 86(f). Petitioners were unjustly pursued by an overly oppressive reading of the Casino Control Act. Neither the Division, nor the Commission could ascribe foreknowledge to Petitioners that their mere association with a career offender, absent any improper conduct, would disqualify them as union leaders.

### A. Section 86(f) Does Not Give A Union Leader Of Ordinary Intelligence Adequate Notice Of Who Is A "Career Offender"

Section 86(f) of the Act enables the Commission to disqualify any individual who is associated with a "career offender" when the association is of such a nature as to be inimical to the policy of the Act. Although section 86(f) does define

the term career offender[6], procedural due process requires that -- in applying the statute to Petitioners -- they should have been given notice that Scarfo was, in fact, a career offender prior to the Division's quest for their disqualification. The New Jersey Supreme Court has stated that the defendant should be "reasonably apprised, as a matter of common intelligence, in light of ordinary human experience, that his particular conduct was unlawful." State v. Lashinsky, 81 N.J. 1, 18 (1979). This is the correct due process standard under Grayned. The New Jersey Supreme Court, however, failed to observe it in this case because until 1982, Petitioners were not reasonably apprised as a matter of common intelligence that Scarfo was to be considered a career offender for the purposes of the Act.

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6. Section 86(f) defines a career offender as "any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this state." N.J.S.A. 5:12-86(f).

Petitioners ask this Court what they rhetorically asked the New Jersey courts: when were they supposed to know not to associate with Scarfo. Certainly in 1977 when the Casino Control Act was enacted, Petitioners had no indication that at that time Scarfo was a career offender. It was not until 1982 when the Commission specifically found that Scarfo was a career offender that Gerace or Materio had any actual notice. Significantly, each of the incidents of association relied on by the Division in its prosecution took place prior to the identification of Scarfo as a career offender.

Possibly the best evidence of the vague and ambiguous character of section 86(f) is the fact that Scarfo was not "black-listed" by the Commission until six months after Petitioners were disqualified. Section 71 of the Act provides that the Commission shall establish a list of persons who are to be excluded from a licensed casino and that list shall relate to persons whose presence in a licensed casino would, in the opinion of the Commission, be "inimical" to the interest of the

State of New Jersey. N.J.S.A. 5:12-71. Inasmuch as the Commission determined that it was not "inimical" to the interests of the State to have Scarfo conversing with high casino management in 1982, it was plainly unfair for the agency to expect that -- prior to that time -- Petitioners should have known that their commiseration with Scarfo was "inimical."

The Appellate Division affirmed the Commission's contention that Petitioners should have been put on notice that Scarfo was a "career offender" by means of general media publicity. (67a). It is therefore apparent that in place of clear and understandable statutory language that reasonably apprises a person of what conduct is improper, New Jersey advocates "trial by the press" via unconfirmed assertions supported by unnamed sources. The State of New Jersey's notion of fair play and proper warning therefore permits the general media to determine whether an individual is a "career offender" for the purposes of the Act. This Court has stated that "vague laws may trap the innocent by not providing fair warn-

ing." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Petitioners contend that unconfirmed assertions by the general media do not provide the adequate fair warning which is required by the Constitution.

Due process required that Petitioners be provided with a reasonable opportunity to know what conduct the Act prohibited so that they could act accordingly. Since Petitioners did not have notice that Scarfo was a career offender until after the Division sought their disqualification, they did not have an adequate opportunity to dissociate themselves from Scarfo prior to the Commission's attempt to have them removed from Union office. This lack of adequate notice is unfair and cannot withstand due process scrutiny. Review by this Court is therefore both necessary and appropriate at this time.

B. The Term Inimical Does Not Give A Person Of Ordinary Intelligence Adequate Notice Of What Conduct Is Prohibited By The Act

Neither Respondent contended that all associations with career offenders are "inimical" under

section 86(f). Had that been the case, the legislature would have simply prohibited all such associations by making no reference to the "inimical" requirement. By prohibiting "inimical" associations, however, the legislature placed an impossible burden on individuals involved in the casino industry. They were required to speculate as to which of their existing associations with unnamed career offenders were to be ended.

This Court's decision in City of Mesquite v. Aladdin's Castle, Inc., 455 U.S 283 (1982) exemplifies its concern with vagueness issues. In Aladdin's Castle, the Court concluded that a regulation in a civil matter requiring an investigation into a licensee's connection with "criminal elements" is not void for vagueness under federal constitutional standards. The Court found that the "connection with criminal elements" standard was merely a factor in, and not determinative of, the decision whether a license application woul be approved. If, however, the application of the disputed term "connection with criminal elements" was determinative of the licensing decision, the

Court assumed, without deciding, that such a standard was "too vague to support the denial of an application for a license...." 455 U.S. at 290.

The principles of Aladdin's Castle are applicable here. Like the term "connections with criminal elements", the section 86(f) term "inimical... association with a career offender" is too vague to support the denial of a license. In contrast to the statute in Aladdin's Castle, however, the disputed term in section 86(f) is in fact determinative of the licensing decision. Indeed, the disputed section 86(f) terms are the standard for approval or disapproval of a union official's qualifications. Therefore, unlike the disputed statute in Aladdin's Castle, section 86(f) cannot withstand the constitutional challenge to its imprecision and lack of standards.

In addition, the verbal shortcomings of 86(f) are magnified by the harshness of the Commission's application of the Act. Petitioners were held to a standard for which there was no statutory authority. Concurrently, they were penalized for actions which took place prior to any fair warning.

As noted, the Commission acted before it identified those persons with whom a mere association might be considered "inimical" to the gaming industry.

Having found "no direct evidence" of influence, the Commission took the position that the reputation of some career offenders is so odious as to make any association with them "inimical" to the gaming industry. The imposition of this standard on an existing relationship, without warning, is simply unfair. Unfairness rises to the level of deprivation of due process where the vehicle for warning was available and ignored. Had Scarfo been blacklisted pursuant to section 71 and evidence of a continued relationship with Petitioners been presented to the Commission, Petitioners would have no due process claim.

This case is one of first impression. Although Hotel and Restaurant Employees, Etc. v. Danzinger, 536 F. Supp. 317 (D.N.J. 1982) upheld section 86(f) as not being unconstitutionally vague, that case does not control the matter sub judice. In Danzinger, the Court based its

decision on what it considered to be an "objective standard for judging an applicant's actions." Id. at 337. The Court focused on the statutory requirement that the Commission have a "reasonable belief" that the disputed association was "inimical to the Act. Id.

The Danzinger decision is erroneous. The Court missed the point of the vagueness argument. The fact that the Commission had "a reasonable belief" of what the Act provided offered no notice to Petitioners, who must have reason to know what conduct is prohibited by the Act. This Court has stated that "[a]ll are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). By failing to sufficiently inform a person of ordinary intelligence what is precisely prohibited, the "inimical" standard in section 86(f) risks the ensnarement of the innocent in a law designed for others.[7] The vagueness of section 86(f) runs afoul

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7. Winters v. New York, 333 U.S. 507, 525 (1948) (Frankfurter, J., dissenting).

of the right of due process. The section is void on its face.

The constitutional problem in this case is that section 86(f) contains no ascertainable standards of guilt. Because section 86(f) permits a disqualification based merely on the undefined terms "if...inimical," the statute encourages arbitrary enforcement dependent solely on the whim of the Commission. Therefore, Petitioners rely on this Court's statement that a statute is unconstitutionally vague if the discretion of those who must enforce it is not limited by explicit legislative standards. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

In this case, the Commission's disqualification decision was based on the determination of whether a particular association was "inimical" to the Act. The relevant statutory language, however, is unaccompanied by any criterion upon which a disqualification decision is to be made. The inclusion of such precise criterion could have been easily drafted by the New Jersey legislature. For example, the legislature could have adopted pro-

visions similar to those set out in the Waterfront Commission Act. That statute espoused the same prophylactic purpose as the Casino Control Act, but fulfilled its constitutional obligation and specifically set out the grounds for the revocation of licenses. See N.J.S.A. 32:23-93 (1963).[8]

Where there are no standards governing the exercise of discretion by an administrative agency, the agency is encouraged to act arbitrarily. Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972). Indeed, in this case, the lack of standards left the discretion of the Commission unbridled and furnished a convenient tool for the agency to act against someone it "deemed to merit their displeasure." Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

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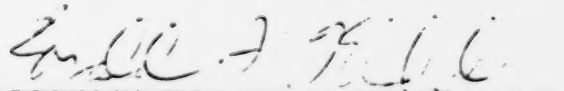
8. In Section 93 of the Waterfront Commission Act, the New Jersey legislature set out five specific grounds for revocation of licenses and registrations. N.J.S.A. 32:23-93. Section 93 does not contain any all consuming or unmanageable terms such as "inimical." Id.

The indefiniteness of section 86(f) trapped Petitioners in a net that was intended for persons whose associations with career offenders involved improper conduct. Petitioners' disqualification directly resulted from the failure of the New Jersey legislature to provide adequate notice in the statute as to what specific conduct was prohibited. For these reasons, the statute is void for vagueness. The writ should issue so that this Court can review and correct the decision of the Court below.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,



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# 85-1308

Supreme Court, U.S.
FILED
JAN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

FRANK GERACE and FRANK MATERIO,
Petitioners,

v.

STATE OF NEW JERSEY CASINO CONTROL COMMISSION
and
STATE OF NEW JERSEY, DEPARTMENT OF
LAW AND PUBLIC SAFETY, DIVISION OF
GAMING ENFORCEMENT,
Respondents.

## APPENDIX ACCOMPANYING PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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January 30, 1986

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SUPREME COURT OF NEW JERSEY
C-217 SEPTEMBER TERM 1985

24,441

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|---|---|---|
| IN THE MATTER OF THE REGISTRATION OF HOTEL AND RESTAURANT EMPLOYEES INTERNATIONAL UNION LOCAL 54 | : | |
| | : | ON PETITION FOR CERTIFICATION |
| (Frank Gerace, Frank Materio & Karlos LaSane) Petitioners. | : | |

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-993-82T3 A-317/525/880-84T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to R. 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 29th day of October, 1985.

FILED
Supreme Court,
November 1, 1985

s/Stephen W. Townsend
CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-993-82T5
A-317-84T5
A-525-84T5
A-880-84T5

IN THE MATTER OF THE HOTEL

AND RESTAURANT EMPLOYEES AND

BARTENDERS INTERNATIONAL UNION

LOCAL 54

---

Argued February 21, 1985 - Decided

Before Judges Matthews, Furman and Havey.

On appeal from an Order of the New Jersey Casino Control Commission.

Michael N. Katz argued the cause for Hotel and Restaurant Employees and Bartenders International Union Local 54 (Meranze and Katz, attorneys; Bernard N. Katz, of counsel).

Ronald F. Kidd, admitted pro hac vice, argued the cause for appellants Gerace, Materio and LaSane (Duane, Morris & Heckscher, attorneys; Steven

M. Janove, and Harry Horwitz of Davis, Reberkenny & Abramowitz, of counsel).

John R. Zimmerman, Senior Assistant Counsel, argued the cause for respondent New Jersey Casino Control Commission (Thomas N. Auriemma, Deputy Director/Legal Division, and Leonard J. DiGiacomo, Assistant Counsel, on the brief).

Eugene M. Schwartz, Deputy Attorney General, argued the cause for the respondent State of New Jersey, Division of Gaming Enforcement (Anthony J. Parrillo, Assistant Attorney General, of counsel; Gary A. Ehrlich, Deputy Attorney General, of counsel and on the brief with Mr. Schwartz).

The opinion of the court was delivered by MATTHEWS, P.J.A.D.

From June to September 1982, the Casino Control Commission conducted hearings to determine whether certain officials of the Hotel and Restaurant Employees and Bartenders International Union Local 54 were disqualified under Section 86 of the Casino Control Act, N.J.S.A. 5:12-1 to N.J.S.A. 5:12-152 (the act). Pursuant to Section 93(a) of that

act, Local 54 had filed an annual registration statement with the Commission. N.J.S.A. 5:12-93(a). The Division of Gaming Enforcement was then requested to review the credentials of the Union and its personnel as mandated by N.J.S.A. 5:12-94(a).

On May 11, 1982, the Division submitted a letter report to the Commission in which it urged that Section 93 sanctions be imposed against several union members. Among the individuals said to be disqualified by the act were the President, Frank Gerace, and Business Manager, Frank Materio. On April 30, 1982, the Division filed another report in which it cited two additional union employees, Eli Kirkland[1] and Karlos LaSane, as disqualified under the act.

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1 The Commission refused to impose Section 93 sanctions against Eli Kirkland.

On September 28, 1982, the Commission issued a determination in which it found Gerace and Materio disqualified under Section 86(f), and LaSane disqualified under Section 86(c). The Commission applied Section 93(b) which prohibits the Union from receiving dues from its employees or from administering pension or welfare funds if any of its officers, agents or principal employees is disqualified by Section 86 of the act. N.J.S.A.5:12-93(b).[2] Frank Gerace, Frank Materio, Karlos LaSane and the union have appealed the adverse decision.

Local 54 represents approximately 14,000 hotel workers, 10,000 of whom are employed in casino hotels in Atlantic City. The Local's members are employed in

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2 The Commission chose not to apply those Section 93 sanctions which would have prohibited the Union from administering pension and welfare funds.

non-gaming positions including waiters, kitchen workers, bartenders, and porters.

In 1979 Frank Gerace was elected as President of Local 54, and was re-elected to that position in June 1982. As chief executive officer, Gerace was authorized to hire and discharge business agents, oversee daily union activities, and engage in collective bargaining on behalf of the Local's members. Frank Materio became an employee of Local 54 in mid-1978. On June 30, 1978, pursuant to a motion made by Gerace, Materio was accepted by Local 54's Executive Board as a union organizer. Materio was appointed to the Executive Board as trustee on January 16, 1979. Karlos LaSane was employed by Local 54 on May 4, 1981 to represent union members at grievance hearings. LaSane also was designated by Gerace as Local 54's affirmative action officer.

Section 86, of the act, N.J.S.A. 5:12-86, sets out the criteria under which an applicant will be denied a license. Among those criteria pertinent here are subsections c and f. N.J.S.A. 5:12-86(c) mandates the disqualification of any applicant who has been convicted of certain enumerated crimes under New Jersey law. N.J.S.A. 5:12-86(f) disqualifies any applicant identified as a "career offender or a member of a career offender cartel" or one who is "an associate of a career offender or a career offender cartel in such a manner which creates reasonable belief that the association is of such a nature as to be inimical to the policy of this act...." (emphasis provided.) N.J.S.A. 5:12-86(f). However Section 93(b) also permits the Commission, at its discretion, to waive the disqualifying criteria. N.J.S.A. 5:12-93(b).

In its letter of May 11, 1982, the Division alleged that Gerace and Materio were disqualified under Section 86(f) by reason of their association with certain career offenders or career offender cartel members. LaSane was claimed to be disqualified under Section 86(c) by reason of a prior criminal convection. Two issues were directed to the Commission with respect to Gerace and Materio: first, whether Gerace and Materio were associated with members of a career offender cartel, and second, whether that association was of such a nature so as to create a reasonable belief that it was inimical to the policy of the act and to gaming operations. The issues directed to the Commission with respect to LaSane were whether he was an officer, agent or principal employee of Local 54 within the meaning of the act, and whether the Commission should waive his

disqualification as permitted by N.J.S.A. 5:12-93(b).

The Division presented extensive evidence to suggest a relationship between Gerace and Materio and career offenders, especial one Nicodemo Scarfo. Testimony at the 1982 hearings concerned Scarfo, the Bruno crime family, and all possible implications between Scarfo and Local 54 members. At the conclusion of the testimony, the Commission made detailed findings of fact regarding the possibility of a relationship between the Union officials and Scarfo, and its extent.

The Commission found that Nicodemo Scarfo has led the Bruno organized crime family since March 1981. The "Bruno family," which operates in the Philadelphia metropolitan area and southern New Jersey, including Atlantic City, was named after its former head, Angelo Bruno. Bruno was murdered in March

1980. Philip Testa assumed control of the "family" following Bruno's death, until he was murdered in March 1981.

The Commission also found that Scarfo had a lengthy history of criminal involvement, beginning in March 1950 when he was convicted of setting up an illegal lottery. He entered a plea of guilty to involuntary manslaughter in 1964, and most recently, was convicted of possession of a firearm by a convicted felon in 1981. The Commission concluded that Scarfo is a career offender and an active member of a career offender cartel.[3]

The Commission evaluated the evidence concerning the relationship between Gerace and Materio and Scarfo. It found six areas in which an association between

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[3] Appellants now concede that Scarfo is a career offender.

Scarfo and Local 54's officers is evidenced.

The Division first submitted a telephone list as indicative of Scarfo's association with Gerace and Materio. The telephone list was seized from Scarfo in December 1979 following his arrest for the murder of Vincent Falcone. Some of the names on the list were aliases and many of the numbers were encoded. After deciphering the code, the law enforcement officers determined that several encoded names and numbers related to associates of Scarfo who have been linked to organized criminal activity. Other names and numbers listed in the book were not encoded, such as dentists and attorneys.

The Commission determined that five employees of Local 54 were listed in Scarfo's phone book under aliases. Frank Gerace was listed under the name "Percy," and his number was in code. Gerace's

mother was listed as "Percy Mom," and Susan Holland, Branch Manager of William L. Meyers, Inc., Administrator of Local 54's Health and Welfare Fund, was listed as "Percy Girl." Both women were listed with coded numbers. Materio's number was also on Scarfo's phone list. However, Materio was listed by his proper name and his numbers were uncoded. In addition, Robert Lumio, Secretary-Treasurer of Local 54 from September 1979 to June 1981, and Frank Lentino, Business Agent for Local 54 since 1981, were listed under aliases.

In December 1979, the police found another piece of evidence indicative of Scarfo's interest in Local 54. During their investigation of the Falcone murder, the police seized a piece of paper from Scarfo's dresser drawer containing the words:

> KIS-POTS-GON ALL OUT BACK TO 54 ST. BEFORE FEB.

The Commission found that the note referred to Thomas Kissick, Ernest Potts, and Thomas "Goony" Walsh, and their removal as union officials when Local 491 merged with Local 54 in September 1980. The Commission held that the paper evidenced both Scarfo's interest in the unions, and his advance notice of the union's activities.

The third basis of which the Commission disqualified Gerace and Materio involved the events leading to Scarfo's arrest for the Falcone murder. Shortly after their arrest, Scarfo and his two associates, Leonetti and Merlino, were released on $92,000 cash bail. Twenty thousand dollars of that amount was provided by Gerace's mother. At the hearing, the Division presented documentary evidence that half of Lillian Gerace's contribution was supplied by appellant Frank Gerace.

In addition, after their release, Materio put up his house as property bail for Leonetti and Merlino, so that part of the cash bail could be released. Despite this, Materio testified that he did not know Leonetti and Merlino personally and that he agreed to use his home for bail as a favor to Scarfo's mother, a personal friend. Materio further testified that he had known Scarfo for 25 years, although he had only seen him 6 to 7 times in the prior 5 years.

The Commission next relied on the immunized testimony of Joseph Salerno. Salerno is the principal witness against Scarfo, Leonetti and Merlino in their trial for the murder of Vincent Falcone. Salerno was a plumber in New Jersey. In 1978, when he encountered financial problems, Salerno approached Leonetti for a loan. In June 1979, Salerno had marital problems and Leonetti allowed him to stay

at his premises. From September 1979 to December 1979, Salerno resided at 26-28 North Georgia Avenue, in Atlantic City. During that time, Salerno had frequent contact with Scarfo, Leonetti, Merlino, and Lumio, who was then the Secretary-Treasurer of Local 54.

On several occasions Salerno overheard Scarfo indicate that he controlled the unions. Salerno testified, for example, that on one occasion Scarfo told Lumio that: "I got you your job and I got that other big fat j-o his job and don't you forget it." Salerno also testified that during his stay at 26-28 North Georgia Avenue, he saw Gerace in Scarfo's company 11 or 12 times. Salerno stated that three to four meetings were held at Scarf, Inc., a company owned and operated by Scarfo. Meetings between Gerace and Scarfo were also held at Scarfo's apartment and outside the

premises of 26-28 North Georgia Avenue. Salerno stated, however, that he never overheard Gerace and Scarfo's conversation and never heard them say anything to each other regarding Local 54 and union business.

The Commission also heard evidence about Local 54's dealings with Scarfo associates and cited Robert Lumio, Albert Daidone, Joseph Erace, and Frank Lentino, in addition to Gerace and Materio, as present or former employees of Local 54 who are connected to Scarfo.

Robert Lumio was appointed by Gerace to fill the office of Secretary-Treasurer in August 1979. As previously mentioned, Salerno testified with respect to Lumio's ties to Scarfo. In addition, State agents testified they saw Lumio in the company of Scarfo and Leonetti on several occasions. Albert Daidone became Local 54's business agent for the Camden office in December

1980. Less than four months later, Gerace appointed Daidone to the Executive Board of Local 54. In June 1981, Daidone was appointed Vice President of Local 54 following the death of Robert Lumio. Daidone was an admitted friend of Natale and Angelo Bruno. Natale was described by FBI agents as "a major distributor of illegal drugs" and "a very close associate of Angelo Bruno."

The Commission found that Joseph Erace was the third member of Local 54 with connections to Scarfo. On December 14, 1981, Gerace appointed Erace to the Executive Board of Local 54. Donna Savarese, lounge manager at the Tropicana Casino Hotel, testified to the Commission that on February 6, 1982, Erace approached her and stated that he wanted to introduce her to a friend named Nick Scarfo.

Frank Lentino is the last Local 54 employee with alleged ties to Nick Scarfo.

On June 8, 1981, Gerace appointed Lentino as Camden County Office Manager. Lentino appears on the Scarfo telephone list, previously described, under the name Frank Gray, with a coded number. Lentino is also a proposed alibi witness for Scarfo in connection with the Falcone murder. Thus, the Commission found that there are six present or former employees of Local 54, Gerace, Materio, Lumio, Daidone, Lentino, and Erace who are connected to Scarfo or other members of the Bruno crime family.

The Commission also found connections between Local 54's business dealings and persons or firms tied to Scarfo. The Division first presented evidence that a company hired by Local 54 to perform union headquarters renovation work was connected with Scarfo. In January 1979, Local 54's Executive Board approved a renovation of the union

headquarters and authorized the officers to seek the best union contractors for the job. Toro Construction Company became the general contractor for the renovations. Toro is a legitimate company and was one of four or five contractors recommended to Gerace by John Rich, business agent for Local 33. Although there is no evidence of any irregularity in the way Toro obtained contracts or performed work for Local 54, Toro had contributed $44,000 in cash to the bail for Scarfo, Leonetti and Merlino following their arrest for the Falcone murder. In addition, Rick Casale, roofing contractor who did the roofing work on the renovation of Local 54 headquarters, is a "very close associate of Scarfo."

In 1979 Local 54 sold its headquarters building for $175,000. Part of the real estate commission was earned by one Vincent Sausto, an insurance broker

and real estate agent who handles insurance policies for Scarfo and his relatives, and who has been seen on the premises of Scarf, Inc.

The Division also produced evidence concerning business dealings between Affiliated Leasing Systems, Inc. and Local 54. In march 1979, Affiliated Leasing Systems, Inc. leased a car to Philip Leonetti. On December 18, 1979, Robert Wayne, an account executive with Affiliated, had occasion to go to the offices of Scarf, Inc. to deliver a vehicle. While at Scarf, Inc. headquarters, Scarfo suggested to Wayne that he contact Local 54 with regard to the possible leasing of other vehicles. As a result, Affiliated leased two vehicles to Local 54.

Testimony also was presented on behalf of Gerace and Materio. Sixteen witnesses, including Joseph Menardy,

Business Manager of Local 334, Charles Marciante, President of the New Jersey AFL-CIO, and William G. Rosenthal, Esq. of Shaw & Rosenthal, testified that Gerace was a dedicated and responsible union leader. The Commission found that the testimony on behalf of Local was uncontradicted.

The Commission found, however, viewing the record as a whole, that the association of Gerace and Materio with Nicodemo Scarfo was inimical to the policy of the act and to gaming operations. The Commission further held that once the influence of a career criminal such as Scarfo has been shown, the State need not wait for its detrimental effect on the union to become manifest. Materio and Gerace were, thus, disqualified under Section 86(f) of the act.

The Division also presented evidence for the disqualification of Karlos LaSane.

LaSane has been employed with Local 54 since May 4, 1981. LaSane represents union members employed at Bally's Park Place and Caesar's Boardwalk Regency at grievance hearings. LaSane testified that he attends grievance hearings, speaks on behalf of union members and attempts to resolve whatever problems exist between the employees and management. LaSane has also been designated as Local 54's affirmative action officer. The Commission found that LaSane is an "agent within the meaning of N.J.S.A. 19:41-12.1."

The Division sought to disqualify LaSane on the basis of his prior criminal record. LaSane was convicted in the United States District Court for the District of New Jersey on May 21, 1973, of interference with commerce, aiding and abetting and conspiracy in violation of 18 U.S.C.A. §1951. From May 21, 1968, until

the time of his indictment, LaSane was, as a Commissioner of the City of Atlantic City, Director of Parks and Public Property. According to the indictment, LaSane obstructed and delayed the construction of public projects, purchases of goods, and the licensing of firms which sought to do business with the City of Atlantic City. The offense for which LaSane was convicted is equivalent to a violation of N.J.S.A. 2C:20-5(d). This offense is listed as a disqualifying offense in Section 86(c)(1) of the Casino Control Act. N.J.S.A. 5:12-86(c)(1). The Commission found that LaSane was acting in his official capacity as Commissioner of the City of Atlantic City when he committed the acts which constituted the federal crime. The Commission chose to disqualify LaSane based on his prior conviction, pursuant to N.J.S.A. 5:12-86(c).

I.

Appellants do not dispute that Scarfo is a career offender or that Gerace had a social relationship with Scarfo at one time. They contend, however, that the circumstantial evidence before the Commission did not support a finding of influence "inimical" to the policies of the act within the meaning of N.J.S.A. 5:12-86(f). The State[4] contends the evidence amply supports the Commission's finding that Gerace and Materio operate Local 54 under Scarfo's influence and that the inimical criterion is therefore satisfied.

The standard of reviewing Commission's factual findings was established in In re Boardwalk Regency

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4 All references to "the State" refer to both respondents, The Division of Gaming Enforcement and the Casino Control Commission, unless otherwise specified.

Casino License Application, 180 N.J. Super. 324 (App. Div. 1981), aff'd as mod., 90 N.J. 361 (1982), app. dism. sub nom., Perlman v. Attorney General, 459 U.S. 1981, 103 S.Ct. 562, 74 L.Ed.2d 927 (1982). We held that an appellant court is obligated to determine whether the findings of fact:

> could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard for the opportunity of the Commissioners who heard the witnesses to judge of their credibility.
> [180 N.J. Super. at 333].

The appellate review calls for a careful and principled consideration of the agency's record and findings resting upon a determination of the worth, plausibility and consistency of that record. Mayflower Securities Co. v. Bureau of Securities, 64 N.J. 85 (1973). As we stated in Boardwalk Regency, if it appears that the

Commission's findings might reasonably have been reached from sufficient credible evidence,

> [W]e will not disturb them even in cases in which, had we been doing it, we would have done it differently. Proper respect for the obligation of the agency to accomplish its statutory obligations and consideration for implementation of the legislative intent in the manner designed by the Legislature causes us to proceed with especial restraint in agency matters. [180 N.J. Super. at 334]

The essential question before the Commission was whether the association between Scarfo and members of Local 54 was "inimical" within the meaning of Section 86(f), N.J.S.A. 5:12-86(f). Webster's Third New International Dictionary defines inimical as "harmful or adverse." Webster's Third New International Dictionary, G.&C. Merriam Co., (1971). Thus, if the Commission had "reasonable belief" that the association between

appellants and Scarfo was adverse to the policy of the act and gaming operations, it was obligated to disqualify the labor organization under Section 93. N.J.S.A. 5:12-86(f); N.J.S.A. 5:12-93(b).

The public policy of the State as expressed in the act, necessitates a strong state regulatory interest in all aspects of casino activities. N.J.S.A. 5:12-1(b)(6). The State's interest extends to those labor organizations which represent state-licensed or registered casino hotel workers. N.J.S.A. 5:12-93. Of paramount concern to the Legislature was the exclusion from participation in the gaming industry of all persons with known criminal records, habits or associations. N.J.S.A. 5:12-1(b)(7). Because labor organizations have the power to involve themselves materially in the operation of casino hotels, regulatory supervision of such organizations was

deemed critical. The State Commission of Investigation, in advocating the adoption of what is now Section 93, noted that there were:

> few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. [Report and Recommendations on Casino Gambling by the New Jersey State Commission of Investigation (April 1977) at 1-14]

The Legislature intended by enacting Section 93, to enable the Commission to regulate labor organizations and, thus, prevent members of organized crime from affecting the casino industry through labor unions. See Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54, 468 U.S. ___, 104 S.Ct. 3179, 3182-3184, 82 L.Ed.2d 373, 379-380 (1984).

In view of the legislative background, a properly supported finding

of influence by Scarfo over Gerace and Materio would be sufficient to disqualify the two union members under N.J.S.A. 5:12-86(f). Appellants concede a showing of actual influence would disqualify them. They contend however, that the Commission's conclusions are not supported by sufficient evidence that either Gerace or Materio were subject to the influence of Scarfo.

The evidence cited by the Commission to support its conclusion that Scarfo influenced Gerace and Materio includes: (1) Scarfo's phone list; (2) the fact that appellants helped Scarfo obtain his release on bail in 1979; (3) the testimony of Joseph Salerno; (4) union appointments with alleged ties to Scarfo; and (5) business dealings between Local 54 and Scarfo associates. Appellants contend this evidence does not support the Commission's findings that Scarfo exerted

actual influence over them. With respect to the telephone list, the Commission concluded:

> It can be inferred that the persons on the list are those who Scarfo had occasion to speak with or anticipated that he might have an occasion to speak with on the telephone. In view of the constant attention he receives from the police, it can further be inferred that he kept certain numbers in code because he did not want evidence of his association with those persons to fall into the hands of the authorities. The appearance of five Local 54 employees on the list is evidence of Scarfo's interest in the Union and access to its leaders ...

Appellants argue that the phone list demonstrated nothing more than Scarfo's interest in Local 54 and should be disregarded. The State admits that the phone list, by itself, is not conclusive as to Scarfo's influence over Gerace and Materio, however, the State contends that it is not without value.

Similarly, appellants allege the coded message confiscated from Scarfo in 1979 is not indicative of Scarfo's influence over Gerace and Materio. The message did not refer to either appellant Gerace or Materio. Appellants, however, do not challenge the Commission's conclusion that the message evidenced Scarfo's interest in the union.

The Commission secondly points to bail money posted by Gerace and Materio for the release of Scarfo, Leonetti and Merlino after their arrest for the murder of Vincent Falcone. Gerace contends he supplied Scarfo with $10,000 at his mother's request. Gerace further contends the Commission found that the transaction was open and legitimate. The Commission concluded, however, that Gerace would not risk a major portion of his savings for an organized crime figure unless "motivated

by some strong sense of obligation or loyalty."

Materio also claimed that he put up his house as property bail for Leonetti and Merlino as a favor to Scarfo's mother. Materio testified that he knew Scarfo casually, Leonetti only by sight, and that he did not know Merlino at all. The Commission found Materio's explanation unconvincing. The Commission concluded:

> We cannot believe that [Materio] would put up his house, over the objection of his wife, as bail for people he barely knew. Even if he thought he was putting up bail for Scarfo, or as a favor to Catherine Scarfo, we cannot believe he would do so if his relationship with these people was as casual as he claims.

The Commission also relied on the testimony of Joseph Salerno as evidence of Scarfo's influence over Gerace and Materio. Salerno had frequent contact with Scarfo, Leonetti, Merlino and Lumio.

Salerno testified that Scarfo indicated he owned the unions and that he placed Lumio and Gerace in their jobs. Salerno also testified that Gerace was a frequent visitor of Scarf, Inc. and that Scarfo and Gerace had many private conversations. The Commission found Salerno to be a credible witness and, therefore, took his testimony into consideration.

Appellants argue that Salerno, a confessed "gangster," is not a credible witness. They point out that Salerno perjured himself in testimony before the United States Senate Subcommittee on Investigation regarding Gerace's meetings with Scarfo. Salerno testified before the Senate Subcommittee that he overheard Gerace and Scarfo discuss affairs of Local 54. It was not until he was cross-examined by Gerace's counsel that Salerno admitted he never overheard any conversation between Gerace and Scarfo and

had merely assumed they discussed union business. Appellants urge this court to discredit Salerno's testimony on the basis of his prior perjured testimony.

The State argues that Salerno's credibility could only be judged by the Commissioners who were present during the proceedings, and who found Salerno's assumption that Gerace and Scarfo discussed union business understandable in light of the frequency of their conversations, and Scarfo's prior statements about controlling the unions.

The Commission also listed appointments to union offices of persons tied to Scarfo and business dealings of Local 54 with persons or firms tied to Scarfo, as indicative of an influence "inimical" to the policies of the act. The Commission first noted that Gerace and Materio were responsible for appointing to union offices several associates of

Scarfo, including: Robert Lumino, Albert Daidone, Joseph Erace and Frank Lentino. Appellants contend that all individuals appointed to union positions were qualified for the job. In fact, the Commission conceded that none of the disputed appointees acted illegally or improperly in the conduct of union affairs. Materio also argues that his participation simply consisted of his making a formal motion that the individuals be accepted. His disqualification, he claims, is based on "guilt by association."

Actually, it is irrelevant that appellants' appointments involved qualified individuals. Permitting the infiltration into the union's official positions by friends of organized crime is intrinsically wrong. Furthermore, Materio's participation, was not as innocent as he indicates.[5] For example,

the Commission heard testimony regarding a scheme whereby Salerno would contract for the plumbing work for the renovation of Local 54 headquarters at an inflated rate and would then split the profit with Lumio and Leonetti. Although present when this scheme was proposed, Materio did not attempt to intercede. The plan never materialized due to Salerno's other business commitments.

The Commission finally listed a series of Local 54's business dealings with ties to Scarfo associates and concluded:

> [T]he appointments and business associations, when viewed in the light of the

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5 Appellants include in their argument the results of a polygraph examination taken by Materio after the 1982 hearings. The test results, however, were never before the Commission and, thus, not a part of the record. This court denied respondent's motion to strike portions of appellants' brief and appendix that were not part of the record below.

> evidence concerning Scarfo's interest in the union and access to its leaders, ... renders it impossible to ascribe them to coincidence or to anything other than Scarfo's influence over Gerace and Materio.

As with the union appointments, appellants attempted to refute the Commission's findings by evidence that there were no irregularities evidenced in any of these business dealings. The relevant point is not whether the challenged business associations are themselves improper, but whether they constitute evidence of an external influence on Local 54.

In conclusion, the Commission had a record replete with circumstantial evidence of Scarfo's influence over Gerace and Materio. The evidence manifests itself in the union officials' personal relationship with Scarfo as well as in their business relationships with Scarfo

associates. The sheer number of ties to Scarfo renders incredible an innocent explanation. The Commission considered the legislative intent, as expressed in N.J.S.A. 5:12-1, of preventing organized crime members from affecting the casino industry through labor unions, and found:

> [O]nce the influence of a career criminal such as Scarfo has been shown, we need not wait for its inevitable detrimental effect on the Union and ultimately on the casino industry to become manifest before we can act. The fact of influence by a person such as Scarfo is inimical to the policy of the Act and gaming operations.

Considering the record as a whole, we conclude that the findings of fact are supported by sufficient credible evidence.

II.

Appellants argue that the freedom of association embodied in the First Amendment protects Gerace's and Materio's relationship with Scarfo, and because it

does, such a relationship cannot be restricted based on the State's interest in preventing corruption in the gaming industry. In its decision to disqualify Gerace and Materio, the Commission found that these individuals were operating Local 54 under the influence of Scarfo in a manner that is inimical to the policies of the Casino Control Act. Gerace and Materio argue that because the Commission found no evidence of impropriety or misconduct, they were being disqualified solely because of their "social association" with Scarfo. The State argues that the constitutional question is restricted to whether the First Amendment protects a relationship in which union officials are influenced by members of organized crime. We are asked to determine the bounds of the freedom of association and whether appellants' activity is protected by the First

Amendment guarantees. We also must determine whether the State has a "compelling interest" in prohibiting appellants' association with Scarfo, and whether the means chosen were "closely drawn" to the purpose of the act.

A.

The right of association, which is not specifically mentioned in the First Amendment, has been recognized as incident to the rights of free speech and assembly. It was first acknowledged as a necessary means to promote effective advocacy and the "advancement of beliefs." N.A.A.C.P. v. Alabama, 357 U.S. 449, 460-462, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), reh. den., 361 U.S. 856, 80 S.Ct. 43, 4 L.Ed.2d 96 (1959). In recent decisions, courts have expanded the right to include associations with no overtly political purpose.

In Roberts v. United States Jaycees, 468 U.S. ___, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), the Supreme Court determined that the constitutionally protected right to association has developed in two areas. 104 S.Ct. at 3249, 82 L.Ed.2d at 471. In analyzing prior cases, the Supreme Court concluded that:

> In one line of decisions ... choices to enter and maintain certain intimate human relationships must be secured against undue intrusion by the State .... In another set of decisions, the Court has recognized a right to associate for the purpose of those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion. [82 L.Ed.2d at 471]

Appellants concede their past associations with Scarfo did not involve the advancement of political or religious matters. Instead, they allege that their First Amendment right is protected by the

first line of court decisions, those which protect certain "intimate human relationships."

In Roberts, however, the Court recognized that the right to associate is not absolute:

> Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated attachments ... We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics .... [82 L.Ed.2d at 473]

Lower courts have reinforced an individual's right to freedom of association as defined in Roberts. For example, in Wilson v. Taylor, 733 F.2d 1539 (11 Cir. 1984), the Court held that

it was improper to discharge a police officer based solely on his dating relationship with the daughter of a convicted felon and reputed organized crime figure. 733 F.2d at 1540. The Court found the officer's relationship protected by the First Amendment. The Court of Appeals had expressly noted, however, in a prior decision in the same case, that Wilson had not contested the lower court's finding that association with the father, a known felon and reputed leader of organized crime, was not a constitutionally protected right. 658 F.2d 1021, 1027 (5 Cir. 1981).

Similarly, in Bruns v. Pomerleau, 319 F.Supp. 58 (D.Md. 1970), the district court ruled that the police department's refusal to hire an otherwise qualified individual, solely because he belonged to an organization of nudists, violated the First Amendment. The court, nevertheless,

recognized the Department's interest in the behavior of its officers off-duty as well as on. 319 F.Supp. at 67. The officer's activities, the court held, could be limited only by such associations as were "inimical to the Department." 319 F.Supp. at 67.

Several other courts have extended the freedom of association. Sawyer v. Sandstrom, 615 F.2d 311 (5 Cir. 1980), involved an overly broad loitering ordinance which punished an individual for his act of being in a public place and associating with individuals whom he knew were unlawfully possessing or using drugs. 615 F.2d at 316. The court held that this was an impermissible infringement on his freedom of association. 615 F.2d 311. The Second Circuit also held that an individual's associational right is protected by the First Amendment. McKenna v. Peekskill Housing Authority, 497

F.Supp. 1217 (S.D.N.Y. 1980), mod. on other grounds 647 F.2d 332 (2d Cir. 1981). McKenna involved the invalidation of a public housing authority regulation which required the registration in advance of guests wishing to visit tenants. 647 F.2d at 332. In Fisher v. Snyder, 346 F.Supp 396 (D.Neb. 1972), aff'd, 476 F.2d 375 (8 Cir. 1973), a female public school teacher was terminated because she had male overnight guests. The court held that the teacher's right to associate was violated. 346 F. Supp. at 399. In Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), reh. den. 366 U.S. 978, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), the Supreme Court invalidated portions of the Smith Act, 18 U.S.C. §2385, which prohibited membership in any organization advocating the overthrow of the government by force. The Court held that the statute was unconstitutional to the extent that it

prevented the mere membership in an organization. 367 U.S. at 228.

The State argues that although these cases expand the protected right of association, they do not address the facts as found by the Commission in the present case. Lewitus v. Colwell, 479 F.Supp. 439 (D.Md. 1979) is the most significant federal decision regarding the legitimacy of state regulations of interactions with criminals by persons involved in gaming operations. In Lewitus, an applicant for a Maryland racehorse owner's license was denied licensure because of his association, partially social and partially business-related, with an individual who had been involved in illegal racetrack practices. The Court held that the State had a valid interest in maintaining the integrity, as well as the appearance of integrity, of the gaming industry. 479 F.Supp. at 448. The court

concluded that the applicant's association was not protected by the First Amendment. Id. Although the Lewitus court's rationale reflected a more narrow reading of the scope of protected association than that advocated more recently in Roberts v. United States Jaycees, it cannot be dismissed as suggested by Gerace and Materio. In light of the finding by the court of an inference of illegal influence, the Lewistus decision still would be valid under the broader view of the First Amendment right as taken in more recent cases. [See e.g., Wilson v. Taylor, 658 F.2d 1021, 1027 (5th Cir. 1981)].

The most relevant New Jersey case suggests the same result. Niglio v. New Jersey Racing Commission, 158 N.J. Super. 182 (App. Div. 1978). In Niglio, the Racing Commission barred the spouse of a disqualified person, not solely on grounds

of the marital relationship, but because of the spouse's dependence on and influence by the disqualified individual. This court found no associational rights implicated by the Commission's decision.

There are other New Jersey cases which have denied licenses or other governmental privileges to applicants under the influence of a disqualified individual, without the suggestion that the denial implicated First Amendment rights. See, e.g., In re Disciplinary Hearings Against Schmidt, 79 N.J. 344, 352-353 (1979); Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471, 481-482 (1971), cert. den., 405 U.S. 1065 92 S.Ct. 1500, 31 L.Ed.2d 796 (1972); Florence Methodist Church v. Florence Twp. Comm., 38 N.J. Super. 85, 88-90 (App. Div. 1955).

Appellants contend, however, that their association with Scarfo is within the ambit of the First Amendment freedom.

They claim that their association was purely a social relationship, one that developed through their mothers. Gerace contends it is because of his mother's friendship with Kathryn Scarfo, and Lillian Gerace's maternal pressure, that he helped Scarfo make bail in 1979. Similarly, Materio claims he helped Scarfo, whom he knew for 25 years. It is also for this reason, the union officials argue, that their phone numbers can be found on Scarfo's telephone list.

Assuming a purely social relationship existed between Scarfo and the union officials, the State maintains it is still unprotected by the First Amendment. Although Roberts has expanded the right of association to encompass both "expressional associations" and "certain intimate human relationships," that case has not raised to the level of First Amendment protection every social

relationship which may exist in a society. Roberts, supra, 82 L.Ed.2d at 471. The types of relationships which fall under the protected category include those that, "attend the creation and sustenance of a family, ... the raising and education of children ... and cohabitation with one's relatives ...." 82 L.Ed.2d at 472.

B.

Assuming, arguendo, that the relationship of Gerace and Materio with Scarfo is constitutionally protected, any infringement resulting from their disqualification under Section 86 of the act may still be justified as a compelling State interest. As noted in Roberts, the First Amendment right of association is not absolute. "Infringement on that right may be justified by regulations adopted to serve compelling State interests unrelated to the suppression of ideas, that cannot be achieved through means significantly

less restrictive of associational freedoms." 82 L.Ed. at 474.

Appellants concede that the State has a compelling interest in "keeping organized crime out of unions representing casino employees." The United States Supreme Court also recognized this interest in Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54, 468 U.S. __, 104 S.Ct. 3179, 3182, 82 L.Ed.2d 373, 379 (1984). Furthermore, it is the express policy of the Casino Control Act to protect the industry from the influence of organized crime through labor unions. Report and Recommendation of Casino Gambling by the New Jersey State Commission of Investigation (April 1977) at 1-14; N.J.S.A. 5:12-1(b)(6).

Appellants argue, however, that the Commission found no evidence of influence by Scarfo. They contend Section 86

sanctions should be applied only when the State demonstrates actual influence and impropriety, and not to prevent the possibility of influence at some future date.

In Boardwalk Regency, supra, this court reviewed the Commission's findings that Clifford and Stewart Perlman were unsuitable for licensure based, in part, upon their association with organized crime figures. 180 N.J. Super. 324 (App. Div. 1981). The Perlmans argued that they were disqualified for their "innocent associations" unrelated to the casino industry. 180 N.J. Super. at 339. In affirming their disqualifications, we stated:

> The question was not then, and is not now, whether those transactions were lawful or how lawful, or ethical, or how ethical. The question which the Perlmans failed to see then and, perhaps understandably, do not now acknowledge, is: what of the impact of those transactions

> and associations upon the policies intended to be served by casino gaming regulation under legislative imprimatur? [180 N.J. super. at 348].

The policies "intended to be served," include, the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations, as expressed in N.J.S.A. 5:12-1(b)(6), and the exclusion from participation in the casino industry of persons with known criminal records, habits, or associations, as found in N.J.S.A. 5:12-1(b)(7). Boardwalk Regency also held that there is nothing inherently wrong with sensitive and strict regulations which enable the Commission to control the industry better. 180 N.J. Super. at 341.

Here, the disqualifying conduct of Gerace and Materio closely parallels that engaged in by the Perlmans in Boardwalk Regency. Gerace and Materio personally

associated themselves with an organized crime figure, Nicodemo Scarfo. The Commission found they were responsible for the manifestations of Scarfo's influence in the union's business affairs. As in Boardwalk Regency, the operative question is not whether the association between Gerace, Materio and Scarfo are lawful or ethical, but rather what impact such associations have on the policies intended to be served by casino gaming regulation. See 180 N.J. Super. at 340, 348. The State's interest in maintaining the integrity of casino operations supersedes appellants' right to freedom of association. It should also be noted, that the United States Supreme Court dismissed the Perlmans' constitutional arguments "for want of a substantial federal question." Perlman v. Attorney General, 459 U.S. 1981, 103 S.Ct. 562, 74 L.Ed.2d 927 (1982). The Commission has

demonstrated the compelling State interest of protecting the casino industry. That interest justifies any associational infringement resulting from the disqualification of Gerace and Materio.

III.

Appellants contend that Section 86 of the Casino Control Act is unconstitutionally vague on its face and as applied to them. Specifically, appellants contend that the term "inimical" is impermissibly vague on its face, and that the statute is vague as applied because they were not given adequate notice that Scarfo was a "career offender" until the Commission's hearing in 1982.

A statute is void for vagueness if it is couched in terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." State v. Lashinsky, 81 N.J.

1, 17-18 (1979). As long as procedural and judicial safeguards are available, however, the fact that certain statutory phrases are not "impeccable specimens of draftsmanship" does not impugn their legality. In In re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 345 (App. Div. 1981), quoting In Review Health Care Adm. Bd. V. Finley, 168 N.J. Super. 152, 167 (app. Div. 1979), aff'd sub nom. New Jersey Ass'n of Health Care Facilities v. Finley, 83 N.J. 67 (1980), app. dism. sub nom. Wayne Haven Nursing Home v. Finley, 449 U.S. 104 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), the Court reviewed the values that are offended by vague laws and determined a twofold purpose in requiring specific legislation. The Court first insisted the drafters provide notice as to the conduct prescribed. Secondly, the Court mandated explicit standards for those who apply the

statutes in order to avoid arbitrary and discriminatory enforcement. 408 U.S. at 108.

The degree of specificity, however, depends on the nature of the legislative provision in question. The most stringent judicial review has been reserved for those cases involving criminal statutes or penalties, or situations in which a law threatens to inhibit the exercise of constitutionally protected rights. See Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 890 (1939); Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110, 115 (1972). Regulation of economic activity, by contrast, is subject to a less strict vagueness test. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-499, 102 S.Ct. 2023, 72 L.Ed.2d 476 (1982). The United

States District Court recognized in Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danzinger, 356 F.Supp. 317, 337 (D.N.J. 1982) that "the alleged vague portions of §86 are aimed primarily at economic activity."

In addition, because Section 86(f) does not infringe on constitutionally protected freedoms, a facial vagueness attack can succeed only if it is shown that the statute is "invalid in toto--and therefore incapable of any valid application." Steffel v. Thompson, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223 39 L.Ed.2d 505, 523 (1974). Unless the statute is impermissibly vague in all of its applications, it must be upheld against a facial vagueness attack. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. at 494-495. A plaintiff who engages in some conduct that is clearly proscribed by the statute

cannot complain of the vagueness of the law as applied to the conduct of others. We must examine the vagueness argument against Section 86(f) of the act in light of the facts of the case at hand. United States v. Mazurie, 419 U.S. 544, 551, 95 S.Ct. 710, 715, 42 L.Ed.2d 706, 713 (1975).

Appellants contend the term "inimical" does not give a person of ordinary intelligence adequate notice of what conduct is prohibited by the act. Appellants allege that since not all associations with career offenders are prohibited by the act, persons involved in the casino industry are required to speculate as to which associations are "inimical."

In considering the challenge to the "inimical" criterion, this court must view Section 86 as part of the overall casino regulatory scheme. As we stated Boardwalk

Regency "the words of a statute must not be considered to exist in a vacuum, without reference to relevant policy considerations as they are expressed in the whole act, or without regard for the words of balance of the statute." 180 N.J. Super. at 346.

N.J.S.A. 5:12-86(f) reads as follows:

> The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel or an associate of a career offender or a career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State. A career offender cartel shall

> be defined as any group of persons who operate together as career offenders.

The word "inimical" is not defined. As appellants note, on December 15, 1976, during the public hearings on the Commission Control Act, Atlantic City Commissioner Edmund Colanzi questioned the use of the word "inimical" in the context of the act's disqualification provisions. Colanzi's criticisms were rejected. The State points out that the term "inimical" was interpreted by the Commission as early as 1979, in In Re Application of Resorts International Hotel, Inc., for a casino license, Docket No. 79-C1-1 (Casino Control Commission 1979). There the Commission stated, in part:

> ... [I]n considering an alleged association with a career offender, the Commission is concerned with more than the reflection, if any, which the association has on the character of the Applicant, or other person required to be qualified.

> Even assuming the good character of such a person, a continuing association with career offenders or other unsuitable persons might well be inimical to the Act or to legalized gaming where the nature and quality of the association would justly call into question the integrity of the regulatory process and of casino operations. Such a question would arise where the nature and quality of the relationship create a risk that the career offender might exercise some degree of influence or control over the association with regard to gaming operations or other business incidental to such operations. The danger of such indirect participation by career offenders or other unsuitable individuals cannot be tolerated. [Resorts at 17-19].

Courts have repeatedly upheld, as against vagueness challenges, criterion less definite than that challenged here. Our Supreme Court upheld the standards of "good moral character" and "professional or occupational misconduct" against challenges of unconstitutional vagueness. In re Polk License Revocation, 90 N.J. 550

(1982). In Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 339, 72 S.Ct. 329, 330, 96 L.Ed. 367, 370 (1952), the Court upheld a regulation which directed motor vehicle drivers transporting explosives or inflammable material to "avoid, so far as practicable, ... driving into or through congested thoroughfares...."

In addition, the Supreme Court upheld a statute making it a crime to sell goods at "unreasonably low prices for the purposes of destroying competition or eliminating a competitor." United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 13 (1963). Finally, this court has upheld against a vagueness challenge, the "good character" criterion of the casino control act. In re Broadwalk Regency Casino Application, supra, 180 N.J. Super. at 345-347. The disqualification standard of N.J.S.A.

5:12-86(f), as interpreted and refined by the Commission, is at least as definite and validly applicable to certain types of conduct as was the "good character" standard approved of in Boardwalk Regency and, accordingly, appellants' facial vagueness claim must fail.[6]

A statute is also unconstitutionally vague if the discretion of those who must enforce it is not limited by explicit legislative standards. Grayned v. City of Rockford, supra, 33 L.Ed.2d 222. Appellants argue the "inimical" standard encourages an arbitrary application

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6 The vagueness challenge to the term "inimical" was rejected by the United States District Court in Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danzinger, 536 F.Supp. 317 (1982). Judge Brotman found that the alleged vague portions of Section 86 of the act were aimed primarily at economic activities, and that the penalties which the act imposes are civil rather

(Footnote continued)

dependent solely on the "whim" of the Commission.

In Sunshine Anthracite Coal Co. v. Atkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940) the Court noted that in many cases a statute's application may be difficult to describe. In rejecting a vagueness challenge it stated:

> The difficulty or impossibility of drawing a statutory line is one of the reasons for supplying merely a statutory guide ... that guide is sufficiently precise for an intelligent determination of the ultimate questions of facts by experts .... [310 U.S. at 399-400].

Appellants also argue that Section 86 of the act is unconstitutionally vague

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[6](continued)
than criminal. He also found that Section 86(f) does not address all associations with career offenders, but only those which would defeat the statutory purposes of the act. 536 F.Supp. at 337. In addition, he found that the "reasonable belief" restriction on the Commission's ability to disqualify applicants
(Footnote continued)

to them. Gerace and Materio contend they should have been apprised that Scarfo was a "career offender" prior to their disqualification. It was nct until the hearings before the Commission in 1982, they contend, that they had actual notice Scarfo would be considered a "career offender." They claim that because they were not notified by the Commission of Scarfo's status, they had no way of knowing that their conduct was "inimical" to the policies of the gaming industry.

During 1982, the Commission conducted extensive hearings which resulted in the disqualification of Gerace and Materio on the basis of their association with Scarfo. It is self-

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[6](continued)
established an objective standard for judging an individual's action, and concluded that appellants herein were not likely to succeed on the merits of their vagueness claim. 536 F.Supp. at 337-338.

evident from the facts adduced that the union officials had close contact with Scarfo. Minimally, they had constructive knowledge of Scarfo's illegal activities. The press, furthermore, should have put appellants on notice that Scarfo was not a highly reputable citizen. In 1979, appellants contributed money to a bail fund for the release of Scarfo and his associates, following their arrest for a widely publicized homicide. Although Scarfo was never convicted of that crime, the incident should have warned appellants of Scarfo's possible exclusion from the gaming industry.

Appellants contend, however, they must have actual notice of Scarfo's classification as "a career offender" before they can be disqualified, relying on Broadwalk Regency, supra, for this proposition. In that case, the Perlmans were found to be disqualified due to their

repeated relationship with a person of unsuitable character who associated with persons engaged in organized criminal activities. In concluding that the act was not vague as applied to the Perlmans, this court referred to the fact that the Perlmans had received notice from the Nevada Gaming Commission that their associations would be considered unacceptable. 180 N.J. Super. at 347. We also stated however, that the potential key employee was reasonably apprised by this statute, "as a matter of common knowledge, in light of ordinary human experience, as to the kind of conduct necessary to satisfy this statute (or put another way, the kind of conduct which is likely to result in disqualification)." 180 N.J. Super. at 347. In that light, Boardwalk Regency cannot be cited for the proposition that appellants must receive actual notice from the Commission of

Scarfo's status as a "career offender" before they can be disqualified. See In Re Boardwalk Regency License Application, 180 N.J. at 345-347.

Appellants also rely on the Commission's "black-listing" provision, N.J.S.A. 5:12-71, for the proposition that they should have been given notice. Section 71 provides that the Commission shall establish a list of persons who are to be excluded from licensed casinos because, in the opinion of the Commission, their presence would be inimical to the interest of the act. The list consists primarily of persons convicted of cheating at casino games and of notorious organized crime figures. Scarfo was placed on the list in 1983, after Gerace and Materio were found disqualified by the Commission. However, the Commission contends that the "exclusion list" is not comprehensive, and is not designed to notify the general

public of the identity of career offenders. The incorporation of Section 71 into Section 86(f) is not warranted by the policy of the act and is not required by constitutional law. In addition, Gerace and Materio cannot seriously contend that they were aware that Scarfo was a career offender until he was placed on the "exclusion list."

We conclude that Gerace and Materio were not entitled to be given formal notice that Scarfo was considered a "career offender" prior to the disqualification, and that Section 86(f) of the act is not vague on its face nor as applied to appellants.

IV.

Gerace claims that the Casino Control Commission denied him due process of law by failing to grant him either immunity or a stay of the proceedings. During the 1982 hearings before the

Commission, the Division called Gerace as a witness. Gerace declined to testify on the ground that his answers might incriminate him. Gerace requested that the Commission grant him immunity or a stay of the proceedings until resolution of a pending Grand Jury investigation. The Commission refused both requests. Gerace now argues that the Commission violated his constitutional right to due process.

On May 25, 1982, the Division petitioned the Commission to grant Gerace immunity for the deposition testimony pursuant to N.J.S.A. 5:12-67. However, the Division imposed two restrictions on the grant of immunity. First, the record would be sealed and remain so until further order by the Commission. Second, all parties and their counsel would be prohibited from disclosing the contents of the deposition. The Division claimed that

sealing the transcript was necessary to protect other law enforcement agencies in their ongoing investigations. On May 26, 1982, the Commission granted the Attorney General's petition and incorporated the protective measures. Gerace was deposed by the Division on May 28, June 1, 2, and 3, 1982.

The Commission hearings began in June 1982. On July 14, 1982, the Division requested that the Commission partially unseal the deposition transcripts in order to review, in camera, portions of Gerace's testimony. Gerace's counsel never took a position on the Division's request. The Commission denied the request, stating that it would only accept testimony presented publicly, in compliance with the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., N.J.S.A. 5:12-73(b). For the same reason, the Commission denied the

Division's petition to have Gerace provide live testimony in camera.

On July 27, 1982, Frank Gerace was called as a witness and invoked his Fifth Amendment privilege in response to all substantive questions. The Division refused to request immunity for Gerace's testimony before the Commission, again due to the ongoing criminal investigations. Counsel for Gerace then requested a stay of all Commission proceedings until the Grand Jury investigations were concluded.

The authority of the Casino Control Commission to confer testimonial immunity upon a witness is established by N.J.S.A. 5:12-67, which provides in part:

> If, in the course of any investigation or hearing conducted under this act, a person refuses to answer a question or produce evidence on the ground that he will be exposed to criminal prosecution thereby, then in addition to any other remedies or sanctions provided for by this act, the commission may, by resolution of four of its

> members and after the written approval of the Attorney General, issue an order to answer or to produce evidence with immunity. (emphasis provided).

Determinations with regard to the grant of immunity, have been delegated to the sole discretion of the Attorney General. In re Tuso, 73 N.J. 575, 579 (1977).

Gerace first claims that the Division acted with "unclean hands" by seeking immunity for him in order to obtain his deposition. He claims that by refusing to seek immunity at the Commission's public hearings, the Division effectively prevented him from rebutting their testimony. Thus, the Division received the benefits of his testimony, without the disadvantage of enabling him to defend himself at the Commission's disqualification hearings.

The Division denies receiving any benefit from Gerace's deposition testimony. In United States v. Gerace, 576 F.Supp. 1185 (D.N.J. 1983), upon defendant Gerace's motion to dismiss the pending indictment[7], the federal court held that the government overcame its heavy burden of establishing that the investigation and upcoming trial of Gerace was in no way tainted, directly or indirectly, by his previous testimony given under a grant of immunity. The judge found that the proposed evidence was derived from legitimate sources independent of the immunized testimony. The Division contends that it was to

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7 The indictment alleged Gerace embezzled money in connection with the renovation work done by Toro Construction Company on Local 54's headquarters. Counsel had stipulated that defendant's previous immunized deposition testimony covered matters which were the subject of this prosecution.

protect the grand jury investigations that it sealed the deposition testimony. Although federal prosecution of Gerace would have been possible even after a public release of the immunized testimony, it would have placed a heavy burden on the prosecutor to show the investigation was not tainted. See United States v. Smith, 580 F.Supp. 1418, 1425 (D.N.J. 1984). Gerace's accusation that the Division was only concerned with the future federal prosecution, therefore, must fail. We also note that Gerace never supported the Division's petition that the deposition be reviewed by the Commission in camera.

Gerace also argues that the lack of immunity rendered the Commission's proceedings one-sided. The record indicates, however, that 16 witnesses testified on behalf of Local 54 and its officers. Warren Borrish, for example, testified that Gerace's relationship with

Scarfo was strictly social. Other witnesses testified that Gerace was an effective and honest labor representative. Gerace was thus able to introduce evidence on his behalf without personally testifying.

Gerace next argues that his failure to testify deprived the Commission of crucial evidence. Gerace claims that because there was no direct evidence of influence by Scarfo, the Commission was obligated to grant Gerace immunity in order to have a complete factual record. Gerace, however, ignores the mass of circumstantial evidence presented against him.

Neither state nor federal courts have recognized a due process right to immunity. In Ryan v. State of Montana, 580 F.2d 988 (9 Cir. 1978) cert. den., 440 U.S. 977, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), for example, the Ninth Circuit

determined the State was not required to grant a probationer immunity from use of testimony given at a combined probation-revocation and deferred sentencing hearing at a time when he was under criminal indictment for the same act. Ryan moved for a continuance of the revocation-sentencing proceeding until after his trial on the criminal charge. His motion was denied. Ryan subsequently argued on appeal that he had been denied due process by being forced to elect to remain silent at the sentencing hearing and risk revocation of his probation, or to speak in his own defense and risk incriminating himself on the criminal charge. 580 F.12d at 990. The Ninth Circuit observed that Ryan's decision whether or not to testify was a strategic choice. 580 F.2d at 990. The court refused to find a constitutional right to immunity.

The right to remain silent cannot be infringed through any penalty for asserting that right. Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). The infringement, however, must be a direct consequence of that assertion. Thus, a police officer may not be discharged from office for refusing to testify before a Grand Jury about the performance of his duties. Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968). That is not the situation in this case. Gerace was disqualified solely on the evidence presented against him. Although the Commission could have drawn adverse inferences from Gerace's failure to testify without infringing upon his constitutional rights, it chose not to. Only a penalty directly drawn from the invocation of the right to remain silent is prohibited. See Duratron Corp. v.

Republic Stuyvesant Corp. et al, 95 N.J. 404 (1967).

Similarly, Gerace had no constitutional right to a stay. Gerace requested a stay on July 27, 1982, after 15 days of testimony had been completed. In addition, the term of one of the Commissioners was due to expire on August 4, 1982. The Commission inquired as to when the Grand Jury investigation would end. Counsel for Gerace could not give a definite response.

Gerace's request for a stay was premised on the Grand Jury criminal investigation previously discussed. Gerace's request, however, was tenuous in that he stated he would testify without immunity, only if the Grand Jury did not return an indictment against him. The Commission held that it could not stay the hearings in light of the uncertainty as to the length of the Grand Jury proceedings,

its results and the impending change in its composition.

The Commission's decision was supported by New Jersey and federal cases. In National Freight, Inc. v. Ostroff, 133 N.J. Super. 554 (Law Div. 1975), the Superior Court denied defendant's motion for stay. Ostroff faced both criminal charges and a civil complaint based on the same factual scenario. In denying Ostroff's motion for stay of the civil suit until resolution of the criminal charges, the Law Division judge stated:

> To say that the civil suit must remain in statu quo indefinitely is to import to the courts an impotency unworthy of them. To compel other parties to sit supinely by while their rights or possibility of recovery are eroded is to invite contempt for the law as well as to permit any guilty party to secrete or dissipate the fruits of his wrongdoing. [133 N.J. Super. at 559]

Similarly, in DeVita v. Sills, 422 F.2d 1172 (3 Cir. 1970), the Third Circuit would not stay defendant's civil proceedings until resolution of his criminal charges. In DeVita, a New Jersey attorney and suspended County District Court judge, sought to restrain proceedings for disbarment and removal from judicial office because of a pending indictment arising out of the same alleged misconduct. The Court of Appeals held that, while plaintiff could not be deprived of his right to practice law as a direct consequence of an invocation of his right to remain silent, his alleged right to have the criminal charges resolved before the civil proceedings was without constitutional basis. 422 F. 2d at 1177-1180.

Gerace's contention that he was deprived of due process is without merit.

Appellant was merely forced to elect whether to defend himself against the Division's allegations or to remain silent. The Division was not constitutionally obligated to seek immunity. Furthermore, the Commission was not obligated to grant a stay pending the resolution of the Grand Jury investigation. Gerace was merely put to the constitutionally acceptable choice of whether to testify or to remain silent.

V.

On August 6, 1984, the Division petitioned the Commission for a supplemental order which would directly prohibit Gerace, Materio and LaSane from acting as officers, agents, or principal employees of Local 54. In response to the petition, both Local 54, and Gerace, Materio and LaSane, as individuals, raised issues concerning the appropriateness of additional sanctions. Appellants alleged

that new evidence, not previously heard by the Commission, was now available which would establish that the Commission's original disqualification order of September 1982 was erroneous. Appellants further alleged that the new evidence, by way of testimony of Gerace and Materio, would establish that the Commission's findings of disqualification under Section 86(f) of the act were stale and moot. In addition, appellants contended that the Commission should reconsider the disqualification of LaSane.

On September 12, 1984, the Commission heard oral argument on the Division's petition for direct removal of Gerace, Materio and LaSane. At that time, appellants renewed their requests for a reopening of the record. The Commission denied appellants' request, ruling that the rehearing applications were not in compliance with the act. On September 24,

1984, Local 54, Gerace, Materio and LaSane filed new petitions with the Commission seeking a rehearing of its decision and supplemental order of September 12, 1984. The Commission denied appellants' requests on September 26, 1984. Appellants now challenge that decision. They allege the Commission abused its discretion by refusing to reopen the disqualification hearings.

Administrative agencies have the inherent power to reconsider and redetermine prior decisions in appropriate circumstances. In re Trantino Parole Application, 89 N.J. 347 (1982). Absent legislative restrictions, the agency's power to reopen and modify prior decisions is limited by considerations of fairness and reasonableness. 89 N.J. at 364.

N.J.S.A. 5:12-107(d) governs rehearings by the Commission. Section 107(d) provides, in pertinent part:

> The commission may, upon a motion therefor made within ten days after the service of the decision and order, order a rehearing before the commission upon such terms and conditions as may be just and proper. Such motion shall be granted only upon a finding that there is additional evidence which is material and necessary and which would be reasonably likely to change the decision of the commission, and that sufficient reason existed for failure to present such evidence at the hearing of the commission.

Thus, the Commission may, at its discretion, reopen the hearings once several procedural requirements have been met.

The first restriction in bringing a motion for rehearing is a ten day time limitation embodied within the act. Section 107(d) precludes the Commission from granting rehearings on motions not filed within ten days after the service of its order. N.J.S.A. 5:12-107(d). The

policy behind a time limitation was best explained by the United States Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). The Court, recognizing that a time gap exists between the closing of an administrative hearing and the rendering of a final decision (or judicial review), stated:

> ...If upon the coming down of the order litigants might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. [435 U.S. at 554-555, quoting, ICC v. Jersey City, 322 U.S., 503, 514, 64 S.Ct. 1129, 1134, 88 L.Ed. 1420, 1428 (1944)]

The issue is whether appellants timely filed their motion for

reconsideration. Appellants argue they are seeking a rehearing of the Commission's order of September 12, 1984. The State, on the other hand, contends it is the Commission's 1982 decision which disqualified appellants in the first instance, that they seek to reopen.

Gerace, Materio and LaSane contend that the Commission's 1982 disqualification order and its 1984 sanction order are interrelated. To conduct a rehearing of the 1984 order, the Commission must, by necessity, address the merits of the 1982 disqualification. In addition, they argue, the Commission's 1982 order directed sanctions against the Union. It was not until 1984 that the individual appellants were directly impacted. If appellants' argument is accepted, their motion for reconsideration was timely in that it was filed on September 24, within ten days of service

of the Commission's September 12, 1984 order.

The State claims that the Commission's order of September 1984 merely imposed new sanctions to enforce the disqualifications adjudicated in 1982. Appellants' motion, in that case, was filed two years late and was properly denied by the Commission. The State also argues that the statutory bar is not unjust in that appellants may seek early relief from their disqualifications pursuant to the Commission's reapplication regulations, N.J.A.C. 19:41-8.8.

We need not determine which order appellants are addressing in their motion for reconsideration. The pertinent issue here is whether the Commission abused its discretion in denying appellants' motion. The Commission denied the motion for rehearing by finding appellants failed to

comply with all the requirements delineated in N.J.S.A. 5:12-107(d).

That section establishes four requirements for bringing a motion for rehearing. The moving party must show that: (1) there is additional evidence; (2) the evidence is material and necessary; (3) it would be reasonably likely to change the Commission's decision, and (4) there was sufficient reason for failing to present the evidence at the hearing. N.J.S.A. 5:12-107(d). The Commission has the discretion to grant a rehearing only upon a showing of the factors delineated above.

Gerace contends he satisfied all necessary statutory requirements for a rehearing. His rehearing petition was based entirely on his present willingness to testify before the Commission. He contends that he was unable to testify in 1982 because he was the subject of a grand

jury investigation; also that this testimony is material and necessary and presents new evidence that would change the Commission's decision.

Gerace sought to open the record to testify before the Commission on the following matters: (1) his association with Scarfo since 1982; (2) his alleged business dealing with Scarfo's associates; (3) his appointment to union posts of persons allegedly tied to Scarfo, and (4) Scarfo's alleged influence on Local 54. Gerace claims his testimony presents new evidence because he did not have the opportunity to testify before the Commission. He also claims that the evidence is material and necessary because it directly rebuts the Division's allegations that he was influenced by Scarfo in his business dealings. Gerace reminded the Commission that the Division elicited four days of deposition testimony

from him, a further indication of the importance of his testimony. He also contends that his testimony would change the outcome of the disqualification hearings. Since three Commissioners have joined the Commission since the 1982 hearings, his testimony would enable them to judge his credibility for themselves. Gerace claims that his testimony would also demonstrate to the Commission that the feared "inevitable detrimental effect" has not materialized in the two years since the 1982 proceedings.

The Commission had determined at its September 26, 1984 hearing, that Gerace's representations were "vague and conclusory" and failed to demonstrate the materiality or necessity of his testimony. The Division noted that sixteen witnesses were produced on behalf of Local 54. Those witnesses testified that Scarfo's and Gerace's relationship was strictly a

social one, and that Scarfo exercised no influence over Local 54. To the extent that Gerace's testimony would relate to pre-1982 events, it is merely cumulative or impeaching.

Any testimony relating to events after the 1982 hearing is irrelevant in addressing the Commission's original disqualification decision. Evidence relating to events which occurred between 1982 and 1984 is relevant in the context of a petition for reapplication pursuant to N.J.A.C. 19:41-8.8. That regulation precludes any natural person found disqualified from reapplying for licensure for five years from the date of the Commission's ruling. However, subpart (g) also provides, that any person barred for the five year period, may petition the Commission to permit reapplication at any time. N.J.S.A. 19:41-8.8(g). Once the procedural criteria have been met, the

Commission may grant early reapplication at its discretion. Appellants argue that because of the Commission's unfettered discretion, reapplication provides them with no effective remedy. The act, however, provides explicit guidelines regarding the timing and nature of rehearing applications. In the instance of Gerace's testimony concerning events which occurred after the disqualification hearings, the statutory guidelines have not been met.

The Commission also challenges Gerace's contention that the change in their composition warrants a rehearing. The Casino Control Commission is a continuing body. Gerace's contention that a rehearing is necessary so that the three new members can express their positions is without merit. To the contrary, the substantial change in the Commission's composition renders a rehearing

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inappropriate. If a rehearing is granted, only two Commissioners would be able to weigh the new evidence against the testimony taken at the 1982 hearings.

Finally, Gerace's explanation for his inability to testify before the Commission in 1982 does not meet the statutory requirement of "sufficient reason." N.J.S.A. 5:12-107(d). Gerace was the subject of a federal grand jury investigation at the time of the 1982 proceedings. His decision not to testify was a tactical choice. The Commission is not obligated to relieve him of the consequences of that choice because of a change of mind two years later. The Commission did not abuse its discretion in refusing to reopen the record to elicit Gerace's testimony.

The argument on behalf of Materio for a rehearing is more tenuous. Materio testified before the Commission during the

1982 disqualification hearings and, therefore, Gerace's fairness argument is inapplicable as to him. However, Materio now wishes to testify that: (1) he no longer performs work that is related to the Casino industry; and (2) he no longer associates with Scarfo in a manner that is "inimical" to the policies of the act.

Materio claims that his testimony would dispel the Commission's fear of a "Scarfo effect." Although Materio's testimony would produce "additional" evidence not before the Commission at the 1982 hearings, it is inappropriate at this time. As in the case of Gerace, evidence regarding events which occurred after the disqualification hearing are relevant only for reapplication procedures, pursuant to N.J.A.C. 19:41-8.8.

Materio also wishes to offer proof that he no longer functions in any capacity involving the representation of

casino employees. The Division argues that Materio's present non-participation in the casino industry does not rebut his disqualification. The Commission's orders could easily be evaded by changing or vacating positions, if that were the case. Furthermore, Materio did not resign his union offices until November 29, 1984. The Commission did not abuse its discretion by refusing to reopen the record to obtain Materio's testimony.

LaSane, like Materio, testified fully at the disqualification hearings. His rehearing petition is based on additional evidence regarding: (1) his exemplary conduct in office in the past two years; (2) the fact that his conviction is now more than ten years old, and (3) his union responsibilities are unrelated to employees licensed under the act.

LaSane's conduct since 1982 is not relevant to a rehearing. Action which occurred after his disqualification is relevant, if at all, to a petition for early reapplication, pursuant to N.J.A.C. 19:41-8.8. LaSane filed a reapplication petition with the Commission in November 1984 which was pending as of the date of this appeal.

In addition, a ten year old conviction does not automatically absolve one of disqualification. Conversely, N.J.S.A. 5:12-86(c)(4) provides that those whose convictions are more than ten years old have the opportunity to rebut the automatic disqualification procedures of section 86(c). LaSane was given that opportunity in 1982. However, the Commission chose not to waive disqualification.

LaSane finally complains that he was unable to demonstrate to the Commission

that his present employment with Local 54 is unrelated to the casino industry. LaSane's argument suffers the same fundamental defect as that advanced by Materio. LaSane, too, did not resign his union position until November 1984. The Commission was not required to consider testimony relating to his new responsibilities. We find no error.

VI.

On September 12, 1984, the Commission ordered Gerace, Materio and LaSane to cease acting as officers, agents or principal employees of Local 54. Appellants argue the Commission acted outside its statutory scope by imposing sanctions directly against the union officials.

In July 1984, the United States Supreme Court upheld Section 93(b) of the act against a challenge that the provision was preempted by federal labor law. See,

Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54, 468 U.S. _____, 104 S.Ct., 3179, 82 L.Ed.2d 373 (1984). The Court held, however, that the Commission's sanctions could not interfere with the ability of Local 54 to act as an effective bargaining agent, and remanded the case to the District Court, for further findings consistent with its decision. 104 S.Ct. at 3196.

On August 6, 1984, the Division petitioned the Commission for a supplementary order. The Division specifically requested the removal from Local 54 of Gerace, Materio and LaSane. The Division cited Sections 64, 129(7) and 75 of the act to support its request.

The order issued by the Commission did not address itself in any way to Local 54, but aimed the sanctions directly against the disqualified union officials.

Appellants contend the Commission was without the statutory authority to issue the September 12, 1984 order. In advancing their position, appellants advocate that a strict construction of Section 93 supports appellants' position. However, as the State argues, appellants' interpretation renders the Commission powerless in several circumstances. Thus, a broader reading of the statutes is mandated; one that encompasses the legislative intent.

The disqualification hearings before the Commission were brought in accordance with Section 93 of the act which provides, in pertinent part:

> a. Each labor organization, union or affiliate, seeking to represent employees licensed under this act and employed by a casino hotel or casino licensed shall register ...
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and

> representing or seeking to represent employees licensed under this act may receive dues from any employee licensed under this act and employed by a casino licensee or its agent, or administer pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in Section 86 of this act. The Commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require. (emphasis provided; N.J.S.A. 5:12-93)

The express language of Section 93 indicates it is the labor organization that must register under the act. In addition, it is the union against which the authorized sanctions are to be imposed. Conspicuously absent from the language of Section 93 is any indication that union officials are deemed

"registrants" within the scope of Section 93, and are thus subject to individual sanctions.

Appellants argue that it is the express language of Sections 93(a) and (b) that is controlling. The language of that provision indicates that regulation of labor organizations and their officers was to be accomplished through the registration of the institution itself. If the Legislature had intended otherwise, appellants argue, it would have drafted the language of Sections 93(a) and (b) to permit sanctions directly against union officers and agents.

The State acknowledges that N.J.S.A. 5:12-93 does not explicitly empower the Commission to issue sanctions directly against union officers. The State contends, however, that the act delineates a procedure designed to indirectly coerce the removal of disqualified officials.

Should this indirect coercion fail, the State argues, the Commission cannot be left powerless to protect the casino industry.

The express language of the act must be read in light of the legislative intent which was incorporated into the act itself in N.J.S.A. 5:12-1. It provides that it is the policy of this State to regulate and control all aspects of the casino industry. This policy was further expressed by our Supreme Court in Knight v. Margate, 86 N.J. 374 (1981), where the Court held:

> ... because casino operations "are especially sensitive and in need of public control and supervision," the statute dictates that "the regulatory and investigatory powers and duties shall be exercised to the fullest extent consistent with law to avoid the entry" into casino operations, directly or indirectly, of persons whose economic or occupational pursuits are violative of the "criminal or

> civil policies of this State." [86 N.J. at 382, quoting, N.J.S.A. 5:12-1(b)(9); emphasis added]

Appellants argue that Section 93 of the act imposes sanctions that are penal in nature, and therefore, the expansive view of that provision, as advocated by the State, must fail. They claim that the Commission forced the removal from office, under threat of contempt, of union officials who were otherwise legally pursuing their livelihood. The Commission's order merely substituted another sanction for that expressly called for by the act and, thus, the penal nature of Section 93(b), and the Commission's action has not changed. Given the penal nature of the applicable provisions, appellants argue, Section 93 must be strictly construed. State v. Grant, 196 N.J. Super. 470, 480 (App. Div. 1984).

Most of the provisions of the act are regulatory rather than penal in nature. The State argues that those provisions applied by the Commission, Sections 64, 129(7) and 75, are regulatory. In addition, assuming arguendo that Section 93 sanctions can be penal, they are not as applied in this case. The cases cited by appellants on their behalf involve individuals who were deprived of their livelihoods by the suspension of their license. See, New Jersey State Board of Optometrists v. Nemitz, 21 N.J. Super. 18 (App. Div. 1952). Here appellants may work as union officials in this State as long as they are not affiliated with the casino industry.

In its petition for supplemental sanctions, the Division cited several other sections of the act which govern the Commission's authority. Section 64, which

regulates the Commission's powers and sanctions, provides in pertinent part:

> The commission shall assure that licenses, certificates, or permits shall not be issued to nor held by, nor shall there be any material involvement, directly or indirectly, with the licensed casino operation or the ownership thereof by, unqualified or disqualified persons or unsuitable persons, or persons whose operations are conducted in a manner not conforming with the provisions of this act. For the purposes of this section, "unqualified person," "disqualified person," or "unsuitable person" shall mean any person who is found by the commission to be disqualified pursuant to the criteria set forth in section 86 c., e., f., g., and h., or to lack the financial responsibility and capability specified in the provisions of section 84. In enforcing the provisions of this act, the commission shall have the power and authority to deny any application; limit or restrict any registration, certificate, permit or approval; suspend or revoke any license, registration, certificate, permit or approval; and, impose a penalty on any person

> licensed, registered, or previously approved for any cause deemed reasonable by the commission pursuant to rules and regulations promulgated thereby .... (emphasis added; N.J.S.A. 5:12-64).

This provision confers broad powers on the Commission to take actions against "disqualified persons." Liberally construed in light of the legislative intent, the Commission's powers under Section 64 to impose sanctions directly against the three officials is evident. The Commission's authority to take actions directly against union officials is also sanctioned by a strict construction of the provision. The expressed purpose of Section 64 is to exclude "disqualified" persons from direct or indirect involvement in casino operations. Local 54, and its officers, are "materially involved" in the daily activities of the casino industry through the employment,

management and discipline of casino hotel employees. In addition, the union officials "registered," pursuant to N.J.S.A. 5:12-40 and 41. A "registration," as provided by this act, is "any requirement other than one which requires a license as a prerequisite to conduct a particular business as specified by this act." N.J.S.A. 5:12-40. Thus, even given a strict construction, the Commission was empowered to disqualify Gerace, Materio and LaSane pursuant to Section 64.

In addition, the Commission was empowered to issue a "cease and desist" order against the union officials pursuant to N.J.S.A. 5:12-129, which states, in pertinent part:

> In addition to any penalty, fine or term of imprisonment authorized by law, the commission shall, after appropriate hearings and factual determinations, have

> the authority to impose the following sanctions upon any person licensed or registered pursuant to this act:
>
> (7) Enter a cease and desist order .... [N.J.S.A. 5:12-129]

As previously mentioned, appellants are "registered" pursuant to N.J.S.A. 5:12-40.

The final provision cited by the Division in its petition, N.J.S.A. 5:12-75, dispels any doubt as to the propriety of the Commission's order. N.J.S.A. 5:12-75 states:

> The commission may exercise any proper power or authority necessary to perform the duties assigned to it by law, and no specific enumeration of powers in this act shall read to limit the authority of the commission to administer this act. (emphasis provided)

This provision emphasizes the clear authority of the Commission to take any steps necessary and proper in its enforcement of this act. Read in conjunction with the legislative intent embodied in the act, N.J.S.A. 5:12-1, we

conclude that the Commission properly issued direct sanctions against Gerace, Materio and LaSane.

The Comission's findings that Gerace and Materio associated with career offenders are supported by the evidence. The continual participation of Gerace and Materio in the casino industry creates an unacceptable risk of corruption. In light of the State's compelling interest in protecting the gaming operations, an infringement on appellants' First Amendment right of association is warranted. In addition, the Commission did not deny Gerace due process by failing to grant him a stay or immunity in 1982, or by failing to reopen the record for a rehearing in 1984.

The decision of the Casino Control Commission is affirmed.

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION
DOCKET NO. 81-LO-1

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IN THE MATTER OF THE HOTEL AND :

RESTAURANT EMPLOYEES AND : OPINION

BARTENDERS INTERNATIONAL UNION :

LOCAL 54. :

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BEFORE:

Don M. Thomas, Acting Chairman
Martin B. Danziger, Commissioner
Joel R. Jacobson, Commissioner
Madeline H. McWhinney, Commissioner
Carl Zeiz,Commissioner

APPEARANCES:

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On May 11, 1981, the Division of Gaming Enforcment (Division) filed a letter report with this Commission in which it alleged that three officials of Hotel and Restaurant Workers and Bartenders International Union Local 54 were disqualified under section 86 of the Casino Control Act, N.J.S.A. 5:12-86. The Division therefore urged the Commission to impose the sanctions provided by section 93 of the Act, N.J.S.A. 5:12-93, against Local 54. The Commission scheduled a hearing. Local 54 then filed suit in the Federal District Court for the District of New Jersey seeking, inter alia, to enjoin

the enforcement of sections 86 and 93 of the Act against it. See, Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danzinger (sic), et al., 536 F.Supp. 317 (D.N.J. 1982). At the request of the Court the Commission adjourned the hearing pending disposition of Local 54's motion for a preliminary injunction. Following the denial of that motion, the hearing before the Commission was again scheduled. On April 30, 1982, prior to the commencement of the hearing, the Division filed a second letter report in which it cited two additional employees of Local 54 as suffering from section 86 disqualification and again urged that the section 93 sanctions be imposed against the Union. The Commission thereafter held the hearing, during which it considered the issues raised in both the May 11, 1981, and April 30, 1982, letter reports.

Before proceeding to the resolution of those issues, we will briefly describe the statutory provisions involved. Section 93 of the Act provides that a labor union which seeks to represent persons licensed or registered under the Act and employed at a casino hotel must register annually with the Commission. N.J.S.A. 5:12-93(a). Local 54 represents approximately 14,000 waiters, kitchen workers, bartenders, porters and other hotel workers, the large majority of whom are employed in the casino hotels in Atlantic City and are licensed by or registered with the Commission. Thus, the Union is required to register under section 93, and it has done so.

Section 93 also empowers the Commission to preclude any union which is required to register from receiving dues from any person licensed or registered under the Act and employed in a casino

hotel, and from administering pension or welfare funds, if any officer, agent or principal employee of the union is disqualified under section 86, unless the Commission waives the disqualification "consistent with the public policy of this act and upon a finding that the interests of justice so require." N.J.S.A. 5:12-93(b).

Section 86 of the Act enumerates various disqualifying criteria, which apply not only to officers, agents and principal employees of labor unions, but also to all persons who must be licensed or registered in connection with the ownership, financing, management and operation of casinos and casino hotels. Only two of the section 86 criteria are relevant to the present case. Section 86(c) disqualifies persons convicted of certain enumerated crimes under New Jersey law or of any equivalent offenses in any

other jurisdiction. N.J.S.A. 5:12-86(c). Section 86(f) provides for the disqualification of any person who is "an associate of a career offender or a member of a career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations." N.J.S.A. 5:12-86(f). This section defines a career offender as "any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this state," and defines a career offender cartel as "any group of persons who operate together as career offenders."

In its initial letter report of May 11, 1981, the Division alleged that Local 54's secretary-treasurer, Robert Lumio, and a member of its Executive Board, Frank

Materio, were disqualified under section 86(c) by reason of criminal convictions, and Lumio, Materio and the Union's president, Frank Gerace, were disqualified under section 86(f) by reason of their association with certain career offenders or career offender cartel members. Robert Lumio died prior to the hearing before the Commission, and thus his qualifications were no longer in issue. During the hearing it was established that the statute under which Frank Materio was convicted was later declared unconstitutional and that he had been granted a presidential pardon. The Commission therefore ruled that it would not find Materio disqualified under section 86(c) based on this conviction.

Thus, with respect to Gerace and Materio, the questions which remain for consideration are (1) whether they are associated with a career offender or a

career offender cartel member, and, if so, (2) whether the association is of such a nature as to create a reasonable belief that it is inimical to the policy of the Act and to gaming operations.

In its second letter report, dated April 30, 1982, the Division alleged that two Union employees, Eli Kirkland and Karlos LaSane, had been convicted of crimes enumerated in section 86(c). During their testimony Kirkland and LaSane described themselves as "business agents" and "organizers" for the Union (T-248; T-287; D1; D8), and the Union contended that they are not officers, agents or principal employees within the meaning of section 93. Kirkland and LaSane admitted to their convictions, and certified copies of the convictions were accepted into evidence. It is clear that some of the crimes involved are among those enumerated into section 86(c). However, the Union

urged the Commission to waive the section 86(c) disqualification of Kirkland and LaSane and presented evidence of their rehabilitation and of their value to the Union's membership and the community at large. Thus, with respect to these individuals the issues before us are (1) whether they are officers, agents or principal employees of Local 54, and, if so, (2) whether the Commission should waive their section 86(c) disqualification consistent with the policy of the Act and in the interests of justice as permitted by section 93(b).

Prior to the hearing the Commission ruled that the burden of proof of section 86 disqualification was on the Division. The quantum of proof required is a preponderance of the evidence. In the Matter of the Application of Resorts International for a Casino License, Docket No. 79-CL-1 (1979), at 12. In determining

whether the Division has met its burden we will first deal with the evidence against Gerace and Materio and then turn our attention to Kirkland and LaSane.

## GERACE AND MATERIO

### I. ORGANIZED CRIME

The Division alleges that Gerace and Materio are associated with career offenders or members of a career offender cartel, and thus it has the burden of establishing the identity of the career offenders and the existence of a career offender cartel.

The Division presented extensive evidence designed to prove that certain persons are career offenders or career offender cartel members. Counsel for Local 54 and Gerace, who was separately represented, repeatedly indicated that they had no intention of litigating the

point (see, e.g., T455; Brief at 15).[1] However, during summations counsel for Local 54 questioned whether the Division had met its burden on this threshold issue (T2464). We find that it has.

There was substantial evidence adduced during the course of the hearing regarding the existence and structure of organized crime in the Philadelphia metropolitan area and the southern portion of New Jersey, including Atlantic City. Much of this evidence was introduced through the testimony of John Tamm and James Maher, special agents with the Federal Bureau of Investigation, and Gino Lazzari, an agent with the Pennsylvania Crime Commission, all of whom have extensive experience in investigating

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1 T refers to the transcript. D. refers to the Division's exhibits. R refers to Local 54's exhibits. C refers to the Commission's exhibits.

organized crime (T429; 1002-1003; 1268). They indicated that their familiarity with the structure of organized crime and the individuals involved therein was based upon their own investigations, intra-agency communications, contacts with other law enforcement agencies, conversations with confidential informants, authorized wiretaps and discussions with purported members of organized crime (T440; 462; 481; 1003; 1014).

These witnesses described an organization of men who routinely engage in a variety of illegal activities including gambling, loansharking, labor racketeering, extortion, murder, arson, pornography and narcotics trafficking (T430; 452; 1015).

This organization is referred to by its members as La Cosa Nostra which, roughly translated, means "this thing of

ours" (T429). La Cosa Nostra consists of a number of groups commonly called "families," which are generally identified by the name of a significant figure in that family (T451). Generally, each family limits its activities to a particular geographic area (T442). Furthermore, each family adheres to a basic hierarchical structure. The boss is the head of the family (T1006), and the underboss is the second in command (T449; 1007). The consiglieri or counsellor advises the boss and assists him in resolving intra-family disputes (T449; 1007; D54, at 62-64). Beneath the family leadership are units known as regimes which are headed by a capo (T450; 1007). Each regime consists of initiated members of the organization called soldiers (T450; 1007).

The primary family which operates in the Philadelphia-South Jersey area is known as the Bruno family, so named for Angelo Bruno, who reputedly headed the family for a number of years until he was murdered in March 1980 (T449; 451; D15). Following Bruno's death it was reported that his underboss, Philip Testa, assumed control of the family (T1027; D18; D54, at 34). Testa had a lengthy criminal record (D18). He was killed in a bomb blast in March 1981 (T1028).

Agents Tamm (T544) and Lazzari (T1028) testified that Nicodemo Scarfo now heads the Bruno family (see also, R8, at 37-38). Scarfo has a lengthy history of criminal involvement. In March 1950, he pled guilty to setting up an illegal lottery and conspiracy (D97). In February 1964, he pled guilty to involuntary manslaughter after being charged with murder (D96). In June 1971, he was held

in contempt for refusing to testify before the New Jersey State Commission of Investigation and was committed to Yardville Correction Center (D92). In July 1976, he was incarcerated for refusing to answer questions before a State grand jury investigating allegations of obstruction of justice in a criminal prosecution (D93). Lastly, he was convicted of possession of a firearm by a convicted felon in 1981 (D95). In sentencing Scarfo to prison for two years for this last conviction, the court concluded: "Mr. Scarfo is surrounded by violence" (D60, at 92, part 2).

There was evidence presented during the hearing of Scarfo's recent involvement in both loansharking and illegal gambling endeavors (T487-88; D14; D60, at 38-42 first part).

On November 4, 1977, the FBI, using a court-authorized wiretap, recorded a

conversation at the Tyrone Denittis Talent Agency among Nicodemo Scarfo, Philip Testa, Harry Riccobene and Frank Narducci (T534; D54). Both Riccobene and Narducci have extensive criminal records (D21; D43) and are alleged to have been associates of Scarfo and Testa (T515; 1039). During the recorded conversation the participants referred repeatedly to "La Cosa Nostra" (D54, at 56), "boss" (D54, at 40, 43, 54), "underboss" (D54, at 34) and "consiglieri" (D54, at 35, 36, 62), and clearly indicated that they are members of the Bruno crime family.

Scarfo further evidenced his criminal nature by attempting to recruit members for his criminal group. Joseph Salerno testified to Scarfo's efforts to persuade him to become "a gangster" (T678). Salerno is presently participating in the federal witness

protection program and his testimony will be discussed at considerable length below.

In December 1979, a telephone list was seized from Scarfo following his arrest for the murder of Vincent Falcone (T906-0). This list contained the telephone numbers of numerous individuals who have criminal records and have been associated with organized criminal activity (D9; D16), including Ralph Puppo (T505-506, 1029; D60, at 45-46, first part), Philip Testa (D18; D19; D109), Lawrence Merlino (T1030), Salvatore Merlino (T1028; D59, at 15), Alfred Iezzi (T1030; D58, at 44), Nicholas Russo (T1031), Frank Narducci (T1032; D20; D21), Anthony Ferrante (D24; D25), Antonio Caponigro (T525; D31; D32; D59, at 45), Ralph Napoli (T522-523; 1033; D29), Anthony Casella (T1035; D58, at 45), Frank Monti (T1035; D40; D58, at 48), Salvatore Testa (T1036), Salvatore Profaci (D48),

Lawrence Centore (D51; D60, at 100, first part), Louis Pacella (T527; D50) and Frank Serpico (T530; D49).

We find that Scarfo is a career offender and an active member of a career offender cartel.

Numerous other individuals were identified as being members of La Cosa Nostra or associates of Scarfo during the course of the hearing. However, we will focus specifically on only four of these men as relevant to the matter at hand.

Nicholas Virgilio has been twice convicted of murder (D117-120), and has been identified as a member of the Philadelphia-based crime family (T1039). He is a close associate of Scarfo (T943; 1225). We find that Virgilio is a career offender and a member of a career offender cartel.

Phillip Leonetti who is Scarfo's nephew, was identified as a member of his

crime syndicate (T676-7; 1041-42). Leonetti and Vincent Bancheri are partners in a concrete business called Scarf, Inc. (D121). Joseph Salerno testified that he was told by Bancheri that "Nick Scarfo was really the boss, but they couldn't have him in the corporation" (T667). The Scarf, Inc. office is located at 28 North Georgia Avenue, Atlantic City which adjoins 26 North Georgia Avenue, the residence of Scarfo (T675-6; D64).

Leonetti's criminal record consists of several arrests, two of which were for murder, and a single conviction for a disorderly persons offense in 1975 (D47). Salerno testified, and we find, that Leonetti arranged a usurious loan to him using assets derived from Scarfo (T487-88; D14; D60, at 38-42 first part). We find that Philip Leonetti is closely associated with Scarfo and has engaged with him in a criminal enterprise.

Salvatore Merlino reportedly holds the position of underboss in the Bruno-Scarfo family (T1028). According to Salerno, Salvatore Merlino has assisted Scarfo in his illegal gambling operation (T487-488; D14; D60, at 38-42). Lawrence Merlino has been identified as an initiated member of La Cosa Nostra and a close associate of Scarfo (T700-701; 710; 949; 976; 1043). We find it unnecessary to make specific findings with regard to the Merlinos' status as career offenders or as members of a career offender cartel, although their names will come up again in this opinion.

We now turn the more difficult issue - whether the Division has proven that Gerace and Materio are associated with a career offender or a career offender cartel member "in such a manner which creates a reasonable belief that the association is inimical to the policy of

[the] act and to gaming operations" N.J.S.A. 5:12-86(f). In this respect the hearing focused on the relationships of Gerace and Materio to Scarfo. We now turn to the evidence concerning the existence and nature of their relationships.

## II. RELATIONSHIP OF GERACE AND MATERIO TO SCARFO

The evidence presented by the Division on this issue is diverse and does not lend itself to neat categorization, which is understandable considering the nature of the issue. We must consider each of the areas raised by the Division and the evidence adduced by all the parties to determine whether the Division has proven a section 86(f) disqualification of Gerace and Materio. We will begin with two pieces of documentary evidence taken from Scarfo when he was arrested for murder on December 23, 1979.

On December 16, 1979, Vincent Falcone was murdered. Scarfo, Leonetti and Lawrence Merlino were arrested and charged with the murder. They were tried and found not guilty.

As previously noted, at the time of Scarfo's arrest a telephone list (D16) was taken from his person (T906). A duplicate thereof was taken from a dresser drawer in his apartment at 26-28 North Georgia Avenue (T908).

Law enforcement officials determined that many of the names on the list were aliases and many of the telephone numbers were in code. After deciphering the code they determined that generally, but not invariably, the coded numbers related to associates of Scarfo or of organized crime or of organizations associated with Scarfo. Many of the uncoded numbers related to reputable persons, such as dentists and lawyers, not deemed to be

associates of Scarfo (T920-922; 974; D9; D10).

There were five persons on the list who are or were employed by Local 54. Frank Gerace was listed under the name "Percy" and his telephone number was in code. Frank Materio was listed by his proper name and his business and home numbers were listed in an uncoded fashion. Robert Lumio, who served as secretary-treasurer of Local 54 from September 1979 until his death in June 1981, was listed as "Bob L," with an uncoded number. Frank Lentino, a business agent for Local 54 (T1665) and, since June 1981, office manager of its Camden office, was listed as "Frank Gray," with coded phone numbers for his home and a Teamsters local for which he once worked. Susan Holland, the branch manager of William L. Meyers, Inc., administrator of the health and welfare funds for Local 54, and a "collector" for

the Local's severance fund (T924; 1732; 1904), was listed as "Percy girl," with a coded number. In addition, Gerace's mother, who also lives at 26-28 North Georgia Avenue, was listed as "Percy Mom," with a coded number.

It can be inferred that the persons on the list are those who Scarfo had occasion to speak with or anticipated that he might have occasion to speak with on the telephone. In view of the constant attention he receives from the police, it can further be inferred that he kept certain numbers in code because he did not want evidence of his association with those persons to fall into the hands of the authorities. The appearance of five Local 54 employees on the list is evidence of Scarfo's interest in the Union and access to its leaders, and his encoding of the Gerace and Holland entries evidences a desire to mask his association with them.

The other document in question is another piece of paper taken from Scarfo's dresser drawer after his arrest for the Falcone murder (D62). The writing on this paper is less than clear, but, according to the Division and according to our own reading of the exhibit, it contains the words: "KIS - POTS - GON ALL OUT BACK TO 54 ST. BEFORE FEB" (T936). The Division alleges that the note refers to Thomas Kissick, Ernest Potts and Thomas "Goony" Walsh, and their removal as union officials when Local 491 merged with Local 54 in September 1980.

Thomas Kissick was the head of Local 491, a bartenders local which originally merged into Local 54 (T1824) sometime around 1975 (R8, at 37). Thereafter Kissick became secretary-treasurer of Local 54 (T927). According to Warren Borish, an attorney for Local 54, as casinos became a possibility in Atlantic

City Kissick petitioned the International Union to again split Local 491 from Local 54 so that he could again have his own bartenders union (T1824), and in August 1979 Local 491 was in fact split from Local 54 (T1825; R8, at 42).

Kissick was appointed acting president (R8, at 42) or acting secretary-treasurer (T937) of the new Local 491. The International appointed Ernest Potts, an International trustee, and Thomas "Goony" Walsh, an International organizer, to run the day-to-day affairs of the Local (T927; 1825; 1859-1860; R8, at 42). The International also directed the creation of a joint board to oversee 491 and 54 and Gerace became the chief executive officer of that joint board (T1825-1826).

In September 1980, after one year in existence, 491 again merged into 54. According to Borish, this merger resulted from 491's inability to survive on the

dues it was collecting and the desire of the International to avoid having to register under section 93 of the Casino Control Act as a result the existence of the joint board (T1826-1827). At any rate, as a consequence of the merger, Kissick, Potts and Walsh were out of their union jobs (T937).

We find that the words on D62 refer to the ouster of Kissick, Potts and Walsh from their union positions when 491 remerged with 54. It is true that there is no indication what the letters "st." on the paper mean, and that the paper says "before feb." and the remerger and consequent removal of Kissick, Potts and Walsh did not occur until September 1980. However, the words on the paper are sufficiently clear to support the interpretation given by the Division. The fact that Scarfo had the paper in his possession indicates that he has an

interest in the affairs of these unions and in keeping up to date on who is running them, and that he was supplied with advance notice of the remerger of 491 and 54.

During the hearing the Division attempted to obtain a handwritting exemplar from Scarfo in order to determine if D62 is written in his hand. The Commission ordered Scarfo to produce the exemplar, and upon his failure to do so certified to the Superior Court facts underlying his contempt of the Commission. See, N.J.S.A. 5:12-107(c). However, we do not think it is of particular importance whether the words on the paper are in Scarfo's handwritting. The significant fact is that he had the paper in his possession.

The events surrounding the Falcone murder arrests yield still further evidence of the relationship of Gerace and

Materio to Scarfo and his associates. Shortly after their arrest, Scarfo, Leonetti and Merlino were released on $92,000 cash bail (T1158). The bail was supplied by Toro Construction Company ($45,000), Scarf, Inc. ($20,000), Catherine Scarfo, Scarfo's mother and a resident at and the owner of 26-28 North Georgia Avenue ($7,000), and Lillian Gerace, Gerace's mother and another resident at 26-28 North Georgia Avenue ($20,000) (D68).

The Division presented documentary evidence establishing that half of Lillian Gerace's contribution to the bail was supplied by Frank Gerace.

On December 28, 1979, Gerace withdrew $10,000 from his $18,316.74 savings account (D69) and transferred it to his checking account (D70). On the same day he wrote a $10,000 check to Lillian Gerace (D71; D72), and she

obtained a $10,000 treasurer's check payable to Catherine Scarfo (D73), thus completing the transfer of $10,000 from Frank Gerace's savings account to the $92,000 bail pool (T1197-1206; 1890).

Shortly after Scarfo, Leonetti and Merlino were released on the cash bail Frank Materio put up his house as property bail for Leonetti and Merlino in order that part of the cash bail could be released (T1608; D68). Despite having done so, Materio testified before the Commission that he knew Leonetti only by sight and had never spoken to him, and that he did not know Merlino (T1605; 1626).

Materio did admit that he had a relationship with Scarfo. He said that he had met Scarfo in a bar approximately 25 years ago (T1604), but had only seen him six or seven times in the prior five years (T1604), had never spoken to him on the

phone, and had no idea why he was on his telephone list (T1612). Materio also testified that he knew Catherine Scarfo and that occasionally he had played cards with Nicodemo's late father, Dan (T1648).

Materio claimed that Lumio approached him on behalf of Catherine Scarfo and he agreed to use his home as bail as a favor to her (T1628), despite the fact that it is his only real property (T1627) and despite the further fact that his wife was "dead against it" (T1744).

We find Materio's explanation unconvincing. We cannot believe that he would put up his house, over the objection of his wife, as bail for people he barely knew. Even if he thought he was putting up bail for Scarfo, or as a favor to Catherine Scarfo, we cannot believe he would do so if his relationship with these people was as casual as he claims. In the ordinary course a person would not put up

his house, or $10,000 of the $18,000 in his savings account, as bail unless motivated by some strong sense of obligation or loyalty.

The telephone list, "KIS-POTS-GON" document, and the providing of bail, taken together, are persuasive evidence that Gerace and Materio have a more than casual relationship with Scarfo and his associates, and that Scarfo has an interest in the affairs of Local 54. However, there is further evidence in this regard which must be considered, much of which is based on the testimony of Joseph Salerno.

Salerno was the principal witness against Scarfo, Leonetti and Merlino at their trial for the murder of Vincent Falcone, and is now in the federal protected witness program. He testified before the Commission, and before the United States Senate (R8), about his

experiences while a resident at 26-28 North Georgia Avenue, and in particular about the contact he observed between Scarfo and his associates and Gerace, Materio and other Local 54 officials.

Salerno was a plumber operating a small business in Brigantine, New Jersey (T665-666). In 1978 he encountered financial problems and went to Philip Leonetti, whom he had met on a job site, for help (T668-669). Leonetti loaned Salerno $10,000, which he said he had gotten from Scarfo (T871), and charged him interest of $250 per week until the principal was repaid (T669-670). Salerno wound up paying Leonetti $19,000 in principal and interest and going into bankruptcy (T670).

Salerno also had marital problems and in June 1979 he moved out of his home and Leonetti allowed him to stay at a house in Margate owned by Salvatore

Merlino (T671). He later moved to an apartment in Ventnor for two weeks and then into an apartment at 26-28 North Georgia Avenue (T672). He resided on those premises from sometime in September (T672 until December 17 or 18, 1979 (T677).

While residing at 26-28 North Georgia Avenue Salerno had frequent contact with Scarfo, Leonetti, Lawrence Merlino and Lumio, who was then secretary-treasurer of Local 54 and also a resident at 26-28 North Georgia Avenue.

Scarfo bragged to Salerno about having killed a man with a knife (T682) and claimed that his criminal organization was "going to own Atlantic City some day" (T683). he also tried to recruit Salerno into his crime family. He talked to Salerno about their having the same "blood line," asked him if he could "stand up" if he saw "something happen" in front of him,

and several times asked him if he "would like to be a gangster" (T678; 681-683). Salerno admitted to the Commission that he was intrigued by the idea of being involved in organized crime, and that he told Scarfo that he would like to be "a gangster (T852).

Salerno admitted to Scarfo that he had two guns, and, at Scarfo's request, he gave the guns to him (T689-693). It was one of these guns with which, according to Salerno, Leonetti murdered Falcone in the presence of himself, Scarfo and Merlino (T693-694). The day after the murder Salerno left 26-28 North Georgia Avenue and soon thereafter he told his story to the police (T701).

Salerno testified that he met Gerace in the office of Scarf, Inc. soon after moving to 26-28 Georgia Avenue (T706). He estimated that he saw Gerace in Scarfo's company 11 or 12 times during the course

of his stay at the North Georgia Avenue property from September through mid-December 1979 (T707).

Salerno estimated that three or four of these meetings occurred at the office of Scarf, Inc. (T829); one occurred at the My Way Lounge, a bar owned by convicted extortionist and reputed Scarfo associate Saul Kane (T829-830); three or four occurred outside the premises of 26-28 North Georgia Avenue (T831), and two or three occurred in Scarfo's apartment (T831). The meeting in Scarfo's apartment occurred while Scarfo, Salerno and others, such as Lumio, Leonetti and Lawrence Merlino, were having dinner (T707). Gerace was not part of the dinner group (T865), but he would stop by for long enough to have a glass of wine (T832; 864). Gerace and Scarfo would walk off from the others and talk privately (T708). Salerno said he saw Gerace and Scarfo have

these private conversations about six times, but he was never able to overhear what was said (T709).

Additionally, Salerno said that on at least three occasions when he was in the Scarf, Inc. office he accepted telephone calls from Gerace for Scarfo (T717). On the one occasion when Scarfo was at home, Salerno relayed the message to him and Scarfo told him to tell Gerace that he would return the call (T717-718). Scarfo then went to a telephone booth on the corner to make a call (T718). Besides the three calls he had taken, Salerno said he saw messages for Scarfo from Gerace taken by others (T719).

In his testimony before the Senate Salerno said that Gerace and Scarfo had daily contact directly involving the operation of the Union (R8, at 99). However, when cross-examined about this statement before the Commission, he

admitted that he never overheard any conversation between Gerace and Scarfo and never heard them say anything to each other about L54, and had merely assumed that they discussed Union business (T795).

Counsel for the Union and Gerace have made much of this change in Salerno's testimony, and have urged that we reject his entire testimony. However, we can understand how Salerno came to assume that Scarfo and Gerace were conferring about Union business, and we note that when he was cross-examined on this topic before us he readily admitted that he had not actually heard Gerace and Scarfo discuss the Union.

It is clear from Salerno's testimony that he concluded that Scarfo talked to Gerace about Local 54 because of the frequent and surreptitious nature of their conversations, and because of certain

statements he had heard Scarfo make about unions and Local 54 in particular.

For example, Salerno testified that Scarfo told him: "Don't ever worry about the unions, we own the unions" (T684). Salerno's testimony also established that Scarfo is a braggart and a liar (T892), and certainly this assertion by Scarfo could not be the basis for a finding that he and his associates "own the unions." However, his claim that they do is evidence of his desire to bring unions within the sphere of influence of his criminal organization, and helps to explain Salerno's conclusion that Scarfo talked to Gerace about Local 54 business.

Salerno also related an incident when he and Scarfo were in Scarfo's apartment and Lumio stopped in and began reading a newspaper article which linked Scarfo to Local 54 (T714-715). At one point Lumio began to laugh because the

article disclosed that he had been convicted of a crime several years earlier (T715). Apparently, Lumio found it humorous that his father might finally come to know of the conviction. This provoked Scarfro, who started to scream and curse at Lumio (T716). Salerno quoted Scarfo as saying:

> Let me tell you something, I got you your job and I got that other big fat j-o [Gerace (T839)] downstairs his job and don't you forget it. [T715]

When he heard this Lumio "just humbled himself kind of and shook his head up and down and just listened and left (T715).

Salerno identified the newspaper as the Philadelphia Bulletin and approximately the date of the article as between early November and mid-December 1979 (T847). Subsequent investigation by the Division revealed that a Bulletin article dated December 2, 1982, had

discussed the allegation that Local 54 was connected with organized crime, and had noted Lumio's 1974 conviction (D122).

We reject the Division's argument that Scarfo's hearsay statement provides the basis for a finding that Scarfo "engineered Gerace's ascension to the presidency of Local 54." However, we find that Scarfo did make the statement and that based upon the circumstances and Lumio's behavior, Lumio did evince his acceptance of the statement. We thus find in this testimony further evidence of Scarfo's desire to influence and control Local 54 and Lumio's belief that Scarfo was in some way responsible for Lumio's position with the Union. This evidence also provides further explanation for Salerno's assumption that Scarfo discussed the Local's business with Gerace.

Salerno also testified to an incident which occurred when he and

Leonetti visited a building at 200 Texas Avenue, Atlantic City, which Local 54 had purchased and planned to renovate as its new headquarters (T720). Salerno said that when they arrived they met "Frank Monterino, or something like that" (T721). The Division later established that Salerno was referring to Frank Materio (D65).

Salerno stated that Materio showed him around the building (T721), after which they then rejoined Leonetti, who was conversing with Lumio (T722). Leonetti was insisting that he and Salerno get the plumbing work at the Local instead of a Vineland plumber named Falaska (T722). Leonetti told Lumio that he would inflate the bill and divide the overpayment among the two of them and Salerno (T723). Materio was within earshot of the entire conversation (T723). However, Salerno never submitted a bid on the plumbing work

because he was busy on other jobs (T23, T881) and the work was done by Falaska (T839-840).

Materio testified that he never saw Leonetti at Local 54 headquarters (T1605) and that he has never met Salerno (T1610), and he denied that the incident described by Salerno ever took place (T1610).

We accept Salerno's testimony that this incident occurred, and find that Leonetti, a close associate of Scarfo, attempted, albeit unsuccessfully, to influence the affairs of Local 54. We also accept Salerno's testimony that Materio was in a position to overhear the Leonetti proposal, and reject Materio's contrary testimony. Further, we find the fact that Leonetti would make this illicit proposal in front of Materio an indication that the association between them is not as casual as Materio would have us believe. Finally, we find that this

incident is still further evidence of the interest of Scarfo and his associates in his affairs of Local 54 and a further explanation of Salerno's assumption that Scarfo and Gerace talked about the Union.

Considering all of the evidence discussed to this point-the telephone list, the "KIS-POTS-GON" note, the bail, the Gerace-Scarfo contact and the various incidents testified to by Salerno - a clear picture emerges of a group of criminals who have an interest in unions and especially Local 54, who covet Local 54 as a vehicle for the spread of their criminal enterprise and seek to exercise influence and control over it, and who have frequent contact with its leaders. As for Gerace and Materio, the evidence shows that they have a long-standing relationship with Scarfo and a sense of obligation to him, and that he has access to them. Whether all of this adds up to

the type of association proscribed by section 86(f) is a question we need not decide, because there is considerable evidence, yet to be considered, concerning the Union's dealings with Scarfo associates and the role of Gerace and Materio in those dealings.

## III. DEALINGS OF LOCAL 54 WITH SCARFO ASSOCIATES

The dealings in question fall into categories: the appointment to Union office or employment of persons tied to Scarfo, and business dealings of the Union with persons or firms tied to Scarfo.

We will deal first with the appointments, starting with discussion of Gerace's position in the Union and authority to make appointments, then discussing his role in appointing Materio to his Union position, and finally considering the actions of Gerace and

Materio in appointing other persons tied to Scarfo to positions within the Union.

Frank Gerace did not testify before the Commission, and the record is sparse on the subject of his background. It appears that he held some elective office in Local 508, which became Local 54 in about 1974, and that he then assumed the vice presidency of Local 54 (T954-958; 1867). Further, it appears that in 1976 he was elected vice president of Local 54 while Jack Brown was elected president. Sometime later in 1976 Gerace assumed the presidency when Brown left to become an organizer with the International (T958). In the beginning of 1978 Brown returned and resumed that top post, but he left again in the fall of 1978 to take a job with Resorts International Hotel Casino (T958). At that time Gerace again assumed the presidency (T959). He was elected

president in 1979 and 1982 (T1867), and he serves in that position today.

As chief executive officer, Gerace is authorized by the by-laws of the Local (C3) "to hire and discharge Business Agents, Organizers, Assistants and all other agents, subject to approval by a majority of the Executive Board." Article IX, Section 1. Furthermore, Article VI provides in pertinent part:

> [V]acancies in all offices shall be filled for the unexpired term by appointment of the President, subject to the approval of the Executive Board.

Turning to Materio, a letter dated February 2, 1978, from the International to Jack Brown, then president of Local 54, indicates that Brown had solicited financial assistance from the International in order to hire additional employees for the Local (C3, letter of 2/2/78). The International acceded to

Brown's request and three "local organizers" were hired by Local 54 on July 3, 1978. One of the three was Frank Materio. The vice president Gerace moved to accept Materio and the others as organizers (C3, minutes of 6/30/78). On January 16, 1979, the Executive Board approved President Gerace's appointment of Materio to the Executive Board as trustee (C3, minutes of 1/16/79).

We turn now to the appointments of the other Scarfo-connected individuals.

Robert Lumio

As previously explained, in August 1979 part of Local 54 splintered away and became Local 491 and Thomas Kissick, secretary-treasurer of Local 54, resigned to joint Local 491 (C3, minutes of 8/13/79). To fill the vacated office of secretary-treasurer, Gerace appointed Robert Lumio (D56). Lumio occupied that

position until his death by natural causes in June 1981.

We have already explained that Lumio lived at 26-28 North Georgia Avenue and have discussed Salerno's testimony about Lumio's ties to Scarfo. In addition, we note that Lumio characterized himself as being friendly with Scarfo, Leonetti and Lawrence Merlino (D61). He was a proposed alibi witness for Leonetti following his arrest in 1977 for the murder of Guiseppi "Pepe" Leva (D67), and again for Leonetti, Merlino and Scarfo following their arrest in 1979 for the murder of Vincent Falcone (D61).

Frank Materio testified that he put up his house for bail for Leonetti and Merlino as a result of a request made by Lumio on behalf of Catherine Scarfo. (T1608).

On April 4, 1979, an agent of the State Commission of Investigation saw

Lumio and Nicholas Virgilio exchange a kiss in front of 26-28 North Georgia Avenue (T941-942). On April 7 the agent saw Lumio and Scarfo leave North Georgia Avenue in a car and later return (T942-943). On April 11 he saw Lumio with Scarfo and Leonetti (T943-945). On November 16, 1979, he saw Lumio with Scarfo and Leonetti at the Scarf, Inc. office (T947). Lumio was at the police station when Scarfo was released on bail after his arrest for the Falcone murder (T984) and attended a subsequent celebration at the Scarf, Inc. office (T987). On January 22, 1980, the Philadelphia police photographed Lumio in the company of Virgilio at the funeral of the mother of Saul Kane (T1221; D75). In short, Lumio's ties to Scarfo, Virgilio, Leonetti and Merlino were manifest.

Albert Daidone

According to his testimony before the State Commission of Investigation, Albert Diadone became a member of Local 170, a bartenders local in Camden, in about 1965 (D126, at 25-26). In 1978 he was elected vice president of that Local, running on a ticket headed by Ralph Natale (D126, at 26).

In January 1979 Natale was convicted of arson, racketeering and mail fraud and in February 1979 he was convicted on drug charges. He is serving a 12-year sentence on the former charges and a consecutive 15-year sentence on the latter (T1389; D104; D126, at 144; R8, at 25). He was described by FBI agents testifying before this Commission and the SCI as a major distributor of illegal drugs and the head of an arson-for-hire ring (T1389-1390; D126, at 144), and also as a "very close

associate" of Angelo Bruno (D126, at 142). Charles Allen, a government informant and participant in the federal protected witness program, testified before the United States Senate about Natale's organized crime activities (R8) and before the SCI about his involvement with Rittenhouse Associates, a union dental plan administrator with organized crime ties, and with Larry Smith, the head of Rittenhouse (D126).

Daidone told the SCI that he is a friend of Natale (D126, at 32), Smith (D126, at 2930) and convicted drug dealer (D105-107) Raymond Martorano (D126, at 33). He said it was his custom to see Martorano three or four times a week, and sometimes to act as his driver and to accompany him when he looked for locations to place vending machines (D126, at 34). He also said that he stayed with Martorano every day after Angelo Bruno was murdered,

but he denied that he had acted as his bodyguard (D126, at 33-34). Daidone also admitted knowing Angelo Bruno (D126, at 36), Philip Testa (D126, at 37) and Frank Vadino (D126, at 35). He said that he had read in the newspapers that all of the above-named individuals were connected with organized crime, but that he had no other information in this regard (D126, at 32-38).

When Natale went to prison in February 1979 Daidone continued to serve as an officer of Local 170. However, the Union then became Local 33. According to Daidone's SCI testimony, the new name was intended to "change the image of the union" (D126, at 31). At any rate, in early 1981 Local 33 merged into Local 54 (T1352-1353; C3, minutes of 11/4/80).

When Local 33 merged into Local 54, it became necessary for Local 54 to open a satellite office in Camden. At the

Executive Board meeting of December 29, 1980, Frank Materio moved to authorize the Local 54 officers to appoint several individuals to staff the Camden office, including Daidone in the position of business agent (C3, minutes of 12/29/80). Materio told the Commission that at that time he knew nothing about Daidone and made this motion at the behest of Gerace (T1681-1685). Less than four months later, Gerace appointed Daidone to the Executive Board of Local 54 (C3, minutes of 4/28/81). Within another two months Gerace appointed Daidone vice president of Local 54, following the death of Robert Lumio (C3, minutes of 6/8/81).

Daidone remained vice president of Local 54 until his removal in September 1982 during the hearing before the Commission. Counsel for Local 54 explained that Gerace removed Daidone from office due to his indictment, along with

Martorano, for conspiracy and extortion, and subsequent indictment for the murder of an official of the Philadelphia roofers union.

Joseph Erace

Gerace informed the Executive Board at its meeting of March 9, 1981, that Joseph Erace, a business agent, was among three new staff members at Local 54 (D55). On December 14, 1981, Gerace appointed Erace to the Executive Board to complete the unexpired term of a deceased Board member (C3, minutes of 12/14/81).

Donna Savarese, a wine consultant and lounge manager at the Tropicana Casino Hotel, testified that on February 6, 1982, Erace approached her and stated: "I've got a friend I'd like to introduce you to" (T1114). Savarese accompanied Erace to a table where he introduced her to several people, including Scarfo, who he referred to as "my friend Nick Scarfo" (T1114).

Later, Savarese was again approached by Erace and he questioned her about a member of the Tropicana security staff who had been following him and his party, which included Scarfo. Erace remarked that if this surveillance continued his "friends will take care of him" (T1116). Savarese understood Erace to be referring to Scarfo and his associates as his "friends" (T1116).

Roger Brown, lieutenant of security at the Tropicana, testified that he had been advised that Scarfo, Leonetti and Merlino would be dining at one of the Tropicana's restaurants on February 6, 1982, and that he was directed to keep them under surveillance. During the course of the evening, Brown saw Erace conversing with the three in the hotel lobby for approximately fifteen minutes (T1188). He said that when they approached they were all "friendly," but

that the conversation became "business like" and "serious" (T1189).

Frank Lentino

It is unclear exactly when Frank Lentino first became employed with Local 54. Materio testified that Lentino had worked as a business agent for Local 54 for approximately a year and a half (T1665). On June 8, 1981, Gerace appointed Lentino Camden County office manager (C3, minutes of 6/8/81).

Lentino was a proposed alibi witness for Scarfo in connection with the Falcone murder (D66). Also, Lentino appeared on the Scarfo telephone list under the name Frank Gray, with a coded number (T1034; D9).

There are thus six present or former employees of Local 54, i.e., Gerace, Materio, Lumio, Daidone, Lentino and Erace, who are connected to Scarfo and other members of the Bruno crime family.

Of these six, all but Lentino now serve or have served as Union officers. Materio was appointed to his Union office by Gerace, as were Lumio and Erace. Lentino was appointed Camden County office manager by Gerace. Daidone was appointed business agent on Materio's motion and was appointed an Executive Board member and vice president by Gerace.

We turn now to Local 54's business dealings with persons connected with Scarfo.

Toro Construction

At the January 16, 1979, Local 54 Executive Board meeting the board approved an expenditure of $105,000 for renovations of the new union headquarters and authorized the officers to "seek the best union contractors" for the job. (C3, minutes of 1/16/7). Toro Construction Company became the general contractor for

the renovations (T1673). The job was done in March, April or May 1979 (T893).

As previously noted, Toro contributed $45,000 in cash to the bail for Scarfo, Leonetti and Merlino following their arrests for the Falcone murder (T1159-1160; R8, at 48; D68).

At the March 9, 1981, meeting of the Union Executive Board, a motion was made by Materio and passed by the Board to approve payment of $10,956.22 to Toro (C3, minutes of 3/9/81). It is clear from Materio's testimony before the Commission that when he made this motion he had no idea whether Toro had done work justifying this payment, but that he merely moved to pay the bill because it was on the table before him (T1667-1669). It is not clear if this bill was related to the original renovation work.

Local 54 presented testimony of John Rich, a business agent for Local 33 of the

Bricklayers Union and president of the Building Trades Council of Atlantic City, that to the best of his knowledge Toro is a legitimate company, and was one of four or five union contractors he recommended to Gerace for the headquarters renovation. There is no evidence before the Commission of any irregularity in the way Toro obtained contracts or performed work for Local 54. However, Toro is one more connection between Scarfo and the Union.

Rick Casale

Rick Casale is a roofing contractor who was described by an SCI agent who testified before the Commission as a "very close associate" of Scarfo (T938-939), and whose name was on Scarfo's telephone list (D9). He was also described by Salerno as a frequent visitor to 26-28 North Georgia Avenue (T848-849). Casale did the roofing work on the renovation of Local 54

headquarters (T939). There is no evidence that there were any irregularities in the way the work was done or paid for. However, Casale represents one more connection between Scarfo and Local 54.

Vincent Sausto

Vincent Sausto, whose name was also on the Scarfo telephone list (D9), is an insurance broker and real estate agent who handles insurance policies for Scarfo and his relatives, who has been seen with Scarfo and on the premises of Scarf, Inc. "on numerous occasions," and who has admitted being a "social acquaintance" of Scarfo (T939-940). Sausto received part of the real estate commission on the sale of the Local 54 headquarters building (T939-940). The building was sold for $175,000. The commission was $14,500, of which Sausto received $5,800. The remainder of the commission went to

Phillip Guber, the owner of the real estate agency for which Sausto worked, and to a Mrs. Lashman, the listing broker (T978; 966). The commission on the Local 54 building was one of only two real estate commissions earned by Sausto in the year 1979 (T989). Of course, the commission was paid by the seller of the building, a Mr. Jack Apple (T978). However, it appears that Sausto was the agent who represented Local 54 in the purchase of the headquarters property, and he represents one more tie to Scarfo.

Affiliated Leasing

In March 1979 Affiliated Leasing Systems, Inc. leased a car to Phillip Leonetti. As a result of a "lead" from Leonetti, Affiliated sold a car to Virgilio. On December 18, 1979, Robert Wayne, an account executive with Affiliated and his superior, a Mr.

Goldblatt, went to the offices of Scarf, Inc. to deliver the Virgilio vehicle. Leonetti, Scarfo and three or four other persons were present at the Scarf, Inc. office (T1463-1464). Someone suggested to Wayne that he contact Local 54 with regard to the possible leasing of other vehicles (T1466). Wayne testified before the SCI that it was Scarfo who made this suggestion (T1472-1473). In interviews with the SCI, the FBI and the Division, Wayne also identified Scarfo as having made the suggestion (T1474-1475; 1497). However, in his testimony before the Commission Wayne said that "for the longest period of time" he believed it was Scarfo who made the suggestion (T1467), but that he had discussed the matter with Goldblatt, and Goldblatt had told him that he had been sitting next to Scarfo and that Scarfo had said nothing (T1485). Therefore, at the time of his testimony

before the Commission Wayne was no longer sure who had made the suggestion (T1467; 1484). But, he did contact Lumio, and as a result Affiliated leased two vehicles to Local 54 (T1468-1470). Shortly before Wayne's testimony the Union returned the vehicles "on the advice of counsel" (T1476).

We find that it was Scarfo who suggested to Wayne that he called Lumio about the possibility of renting cars to Local 54. In addition, the mere fact that the discussion took place in the presence of Scarfo, at the Scarf, Inc. office, is sufficient to find this one more indication of Scarfo's interest and involvement in the affairs of Local 54, notwithstanding Wayne's testimony that the lease agreements between Affiliated and Local 54 were entirely legitimate (T1482-1483). Nevertheless, this is one

more instance of Scarfo's involvement in the affairs of Local 54.

Frank D'Addairo

Frank D'Addario is a partner in Claridge Associates, which in turn is a partner in Claridge Limited, which owns the Claridge Hotel and Casino. D'Addario is also one of the two members of Claridge Management Corporation, which for a time managed the Claridge. During that time D'Addario met with Frank Gerace and asked him about the unfavorable newspaper publicity involving Local 54 (T1062; 1072). Gerace responded that because of his mother's friendship with Scarfo's mother allegations were being made that Scarfo had influence over the Union (T1062-1063). D'Addario was later introduced to Scarfo at a boxing match at the Claridge, and said to him: "Say hello to my friend, Frank, if you see him"

(T1060-1061). Scarfo responded that he had heard of D'Addario "either through or from" Gerace (T1063).

The Division asks us to take Scarfo's statement that he had heard of D'Addario through or from Gerace as an indication that Gerace discusses Union business with Scarfo. However, to do so we would have to accept Scarfo's hearsay statement as true. We can make a finding on the basis of hearsay evidence if it is legally competent evidence under one of the exceptions to the hearsay rule, Evid. R. 63, or, failing that, if it is nonetheless "the sort of evidence upon which responsible persons are accustomed to rely in the conduct of their serious affairs." N.J.S.A. 5:12-107(a)(6). See, In the Matter of the Application of Seymour Alter for Licensure as a Casino Key Employee, Docket No. 79-EA-60 (1980), at 4-7. Scarfo's statement does not fall

within any exception to the hearsay rule, and the Division does not suggest that it does. Nor do we think that an off-hand social comment by Nicodemo Scarfo is the type of evidence upon which responsible people would rely in the conduct of their serious affairs. We therefore decline to rely on Scarfo's statement as establishing that he in fact heard about D'Addario through or from Gerace. However, we do find that Scarfo made the statement, and we see it as an indication of his willingness to use his relationship with Gerace to give the impression that they do discuss Gerace's business affairs.

In summary, the "business associations" evidence establishes that the commission for the sale of the Union building was paid in part to a Scarfo associate; the $170,000 renovation of the building was done by a company which put up $45,000 in bail for Scarfo, Leonetti

and Merlino; the roofing work was done by a Scarfo associate; and Scarfo was aware of the Union's need for vehicles and recommended that the leasing company used by Leonetti and Virgilio contact the Union. When these four business connections are considered together with the fact that six persons with ties to Scarfo were officials of the Union, the inference that there is more at work here than coincidence becomes irresistible. However, before attempting to reach any broader conclusions, we must consider one additional evidentiary item urged by the Division, i.e., Gerace's failure to testify, and also give further consideration to the evidence offered by Local 54.

IV. FAILURE OF GERACE TO TESTIFY

Frank Gerace was called as a witness by the Division and refused to testify,

invoking his Fifth Amendment privilege against self-incrimination (T2368-2371), and the Division asks us to make a variety of findings based on Gerace's silence.

Of course, the Fifth Amendment guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty...for such silence." Malloy v. Hogan, 378 U.S. 1, 8 (1964). Thus, Gerace had a right to invoke the Fifth Amendment and the Commission cannot impose any "penalty" because of his exercise of that right.

However, the Division argues that the drawing of evidentiary inferences from Gerace's silence would not constitute a "penalty." The Division relies on Duratron Corp. v. Republic Stuyvestant Corp., et al., 95 N.J.Super. 527 (App. Div. 1967), certif. den. 50 N.J. 404 (1967), a civil action seeking damages for

fraud, in which it was held that the finder of fact could draw an adverse inference from the refusal of a defendant to testify. The court explained that the defendant "risked only the probative strengthening of a civil claim against himself with an ultimate hazard of nothing more than a money judgment against him," and also that even this consequence did not flow automatically from his invocation of the Fifth Amendment, but lay within the discretion of the factfinder. The court concluded that this was not such a momentous "penalty" as to run afoul of the Constitution, and explained:

> The permissible drawing by the factfinder of an inference of inability truthfully to deny a civil claim from a defendant's failure to testify as to relevant facts within his personal knowledge which might refute the evidence adduced against him, is a logical, traditional and valuable tool in the process of fair adjudication. It subserves private justice. We conclude

> that it does not impair the privilege against self-incrimination.
> [95 N.J.Super. at 533]

Similar reasoning has been applied in cases involving consequences other than money judgments. In Baxter v. Palmigiano, 425 U.S. 308 (1976), involving an inmate who refused to testify at a prison disciplinary proceeding, the Court applied "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." 425 U.S. at 318. In Diebold v. Civil Service Commission, etc., 611 F.2d, 697 (8 Cir. 1979), the court applied the same rule to an administrative proceeding in which a public employee suspended because of pending criminal charges sought reinstatement in his job.

However, Local 54 and Gerace raise several arguments against the drawing of adverse inferences from Gerace's refusal to testify. First, Local 54 appears to argue that the rule permitting an adverse inference against a party who fails or refuses to testify is inapplicable here because Local 54 and the Division are the only parties to this action. However, even assuming that Gerace is not a party, cf. N.J.A.C. 1:1-1.4, there is authority to support the drawing of inferences adverse to Local 54 on the basis of Gerace's failure to testify as a nonparty witness. See, Brinks, Inc. v. City of New York, 539 F.Supp. 1139 (S.D.N.Y. 1982).

In addition, counsel for Gerace asserts that he advised his client not to testify before the Commission because he is currently a subject of a federal grand jury investigation. However, the pendency of a grand jury probe would not preclude

the drawing of an evidentiary inference from Gerace's silence. Cf., Whippany Paper Board Co. v. Alfano, 176 N.J.Super. 363 (App. Div. 1980).

Counsel for Gerace voices the additional argument that the Division has "unclear hands" in this matter because it could procure Gerace's testimony by requesting that the Commission grant him testimonial immunity. See, N.J.S.A. 5:12-67. The Division responds that it has decided not to seek immunity for Gerace as an accommodation to other law enforcement agencies which are "concerned about maintaining the viability of any future criminal prosecution of Gerace" (Reply brief at 10). Regardless of the merits of this controversy, we do not perceive the granting of immunity as being a prerequisite to the drawing of an adverse inference from Gerace's failure to testify.

Finally, Local 54 and Gerace state that the present action was instituted by the Attorney General's Office, of which the Division is a part; is punitive in nature; is based on alleged involvement with organized crime, and has potentially grave consequences for Gerace, Materio and the Union itself. Thus, the Union and Gerace argue, the drawing of any adverse inference from Gerace's invocation of the Fifth Amendment would amount to the imposition of an impermissible "penalty."

It is clear that this is a civil action, and it is also clear that there is nothing punitive about it. We know of no authority precluding the discretionary drawing of an adverse inference based on the invocation of the Fifth Amendment in a civil action. However, we choose not to draw any inference from Gerace's refusal to testify. The inference flowing from the failure or refusal to testify is

permissible, not mandatory. Viewing the record as a whole, we find it unnecessary to draw an inference from Gerace's refusal to speak, and elect to attach no probative significance thereto.

Finally, the evidence presented by Local 54 deserves further consideration.

V. TESTIMONY ON BEHALF OF LOCAL 54

Local 54 presented sixteen witnesses on its behalf. A number of people from the labor movement testified that both Gerace and Local 54 were effective and honest employee representatives. They included: Joseph J. Menardy, a business manager with Local 334 of the International Electrical Workers; Charles Marciante, president of the New Jersey AFL-CIO; John S. Rich, a business manager for Local 33 of the Bricklayers Union and president of the Building Trades Council of the Atlantic and Cape May Counties

area; and James Gratton, a business manager with the Electricians Union for Monmouth and Ocean Counties and president of the Building Trades Council for the same areas. Rich testified: "I would say he's [Gerace] one of the more dedicated labor union leaders that I know... And I don't think that Frank would do anything wrong intentionally" (T2211).

Similarly, several individuals associated with management testified that Gerace was a tough negotiator and that his paramount concern always seemed to be the welfare and interests of the union members. These witnesses included: William A. Whiteside, Jr., an attorney with Rothschild, O'Brien and Frankel Donald Buzney, Director of Labor Relations at Bally's Park Place Casino Hotel; William G. Rosenthal, an attorney with Shaw and Rosenthal; William J. Downey, Executive Director of the Casino Hotel

Association; Martin L. Blatt, an attorney practicing in Atlantic City; Frederick A. Schenck, Senior Vice President of Administration at Resorts Intenational. Rosenthal testified: "...he [Gerace] is a responsible labor leader who is interested in the welfare of his members and his constituants [sic] who has an interest in the industry and has demonstrated that responsibility throughout our dealings" (T2237).

Three union members testified on behalf of Gerace and Materio. Jane Illingworth, Mickey Fairfield and Michael C. Tenuto testified that both men are accessible to the Union membership, earnest in their desire to serve the membership and honest and straightforward in running the Union. When asked whether he thought Scarfo had any influence on the operations of the Union, Tenuto stated: "...I don't think nobody [sic] runs the

union except really the members because we call the shots for what we want and he [Gerace] backs us up with [sic] the tee" (T2258).

Vincent Pasquale, a catholic priest and director of the Alcoholic Council Service, and Paul Longo, president of the Atlantic City chapter of UNICO, testified that Gerace has an excellent reputation for honesty and integrity.

Finally, Warren Borish testified that he has represented labor unions for approximately ten years (T1808) and has worked closely with Gerace for at least the past five or six years (T1810). Borish described Local 54 as an aggressive, independent, knowledgeable and successful labor organization (T1811). Further, he characterized Gerace as a "very independent person" who "does what he thinks is best for the interests of the membership" (T1816). Borish contended:

"...I've seen absolutely nothing over five or six years with relationships with this Local that would indicate that anybody, including Mr. Scarfo or any other person, has any influence over Local 54 or any of its officers" (T1816).

The testimony of Local 54's witnesses is essentially uncontradicted. We have no reason to doubt the sincerity of their testimony that, to the best of their knowledge, Gerace is a knowledgeable and hard-working union leader and Local 54 is an effective representative of its members. We likewise accept the testimony of those witnesses who said that they had not discerned the presence of any Scarfo influence in the affairs of the Local.

However, none of this precludes a finding that Gerace and Materio are associated with Scarfo in the manner described in section 86(f). Such an association would of necessity be

clandestine and none of these witnesses would be in a position to detect its existence. We will weigh the testimony of Local 54's witnesses along with all of the other evidence in reaching our conclusion as to the qualifications of Gerace and Materio. It is to that conclusion that we now turn.

## VI. CONCLUSION AS TO ASSOCIATION OF GERACE AND MATERIO WITH SCARFO ET AL.

The Commission is now called upon to apply a seldom-used but vitally important part of the Casino Control Act, section 86(f). Before doing so we think some general comments on the nature of the casino industry and our role as regulators of that industry are in order.

It can hardly be gainsaid that legalized gaming is not only potentially harmful to the public but extremely sensitive and vulnerable to improper

influence. Niglio v. New Jersey Racing Commission, 158 N.J. Super. 182, 188 (APP. DIV. 1978); See also, National Institute of Law Enforcement and Criminal Justice Law Enforcement Assistance Administration, The Development of the Law of Gambling: 1776-1976 (1977). Indeed the Federal Bureau of Investigation has long maintained that gambling is the "lifeblood of organized crime." See, Testimony of Frederich Fehl, Acting Assist. Dir., FBI, before the federal Commission on the Review of the National Policy Toward Gambling, Hearings in Washington, D.C., May 10, 1976.

Thus, New Jersey has allowed casino naming only under an extraordinary, pervasive and intensive system of statutory and administrative controls. See, Bally Manufacturing Corp. v. N.J. Casino Control Commission, 85 N.J. 325, appeal dismissed, 102 S.Ct. 77 (1981); In

re Martin, 90 N.J. 295 (1982). A review of the legislative history markes it clear that section 86(f) is an essential component of that system.

In 1977, the Attorney General and the Treasurer of New Jersey, at the Governor's request, assembled a group of senior staff personnel to make recommendations on casino gambling legislation and related topics. That staff policy group concluded that "the uniqueness of the industry, taken with its potential societal consequences and its checkered history in other jurisdictions, compels a state regulatory interest in virtually every aspect of casino and related operations." Second Interim Report of the Staff Policy Group on Casino Gambling, (1977) at 2. The report went on to emphasize that the state interests to be served by a comprehensive regulatory

scheme included more than the traditional law enforcement interest. Id.

Moreover, prior to the enactment of the Casino Control Act, the State Commission of Investigation specifically advised the Governor and members of the Legislature that the nature of the casino industry made it a "vulnerable target for criminal intrusion." Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, (1977) III. The SCI emphasized that only the "most stringent of gambling control laws can thwart the infiltration of casino and related services and suppliers by organized crime." Id. at II.

Significantly, the SCI noted that its experience regarding organized crime strongly suggested that there were:

> few better vehicles utilized by organized crime to gain a stranglehold on an entire

> industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover, the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures. Because of the gravity of the public interest in this particular area, the Commission is of the view that the representatives of labor organizations involving casino employees should be required to register and subjected to qualification according to the ownership disqualification criteria. [Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, Id. at 2.]

Accordingly, the State Commission of Investigation recommended regulation over labor unions affiliated with Atlantic City casino hotel facilities. Id. It is not surprising that the New Jersey Legislature heeded that advice. Indeed, in enacting the Racketeer Influence and Corrupt

Organizations (RICO) Act, 18 U.S.C.A. §1961 et seq., in 1970, Congress also recognized the explosiveness of the combination of labor racketeering and gambling.

The record in this hearing is replete with examples of organized crime infiltration of labor unions. We have previously mentioned the situation of Local 170 under Talph Natale. We will turn to another such situation, that of Teamsters Local 326, shortly. The transcript of the United States Senate hearing on organized crime involvement in unions (R8) refers to many more examples. Of course, the problem of organized crime infiltration of labor unions becomes all the more acute in the case of a union which represents workers in the gambling industry.

In addition, we cannot overlook the fundamental policy of the Act to foster

public trust and confidence in the integrity of the casino industry and related operations, and in the efficacy of the regulatory process.

At the very heart of the public policy set forth in the Casino Control Act is the assurance of "the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations." N.J.S.A. 5:12-1(b)(6). Directly related to this purpose is the legislative declaration that "the regulatory provisions...are designed to extend strict State regulation to all persons...practices and associations related to" casinos and that "comprehensive law-enforcement supervision ...is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process." Id.

Hence, it is the expressed policy of the State of New Jersey to regulate and control all aspects of the casino industry with the "utmost strictness" to the end that public confidence and trust in the honesty and integrity of the State's regulatory machinery can be sustained. Knight v. City of Margate, 86 N.J. 374, 392 (1981).

With this background in mind we must apply section 86(f) to the facts as we find them in this case.

Section 86(f) provides for disqualification upon the finding of an association with a career offender or career offender cartel member "in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations.

There is no doubt that Gerace and Materio have an association with Scarfo,

et al. The issue before us is whether that association has been shown to be inimical to the policy of the Act and to gaming operations. Viewing the record as a whole, we must conclude that it has.

We have been presented with a clear picture of a dedicated group of lawbreakers, headed by Scarfo, who follow the activities of Local 54, have a long-standing relationship with and easy and frequent access to its leaders, and seek to exploit that relationship in order to advance their criminal activities. We have also seen a consistent pattern of the Union staffing its hierarchy with persons associated with Scarfo and doing business with persons and firms with ties to Scarfo. The evidence presented during this hearing simply cannot be explained away as a matter of chance or coincidence, or as the result of Gerace's mother being a friend of Scarfo's mother or Materio

having played an occasional game of cards with Scarfo's late father.

In other words, the appointments and business associations, when viewed in the light of the evidence concerning Scarfo's interest in the Union and access to its leaders, lead ineluctably to the conclusion that there is a "Scarfo effect" at work in this Union. It is true that no direct evidence was presented during these proceedings that any of the appointments or business associations resulted from Scarfo's influence and that in a few instances, such as Toro Construction there is some contrary evidence. However, the sheer number of instances renders it impossible to ascribe them to coincidence or to anything other than Scarfo's influence over Gerace and Materio.

We are also aware that the record is silent as to whether any of the Scarfo-related appointees have acted

illegally or otherwise improperly in the conduct of the Local's affairs, or that any of the business associations were other than legitimate. However, once the influence of a career criminal such as Scarfo has been shown, we need not wait for its inevitable detrimental effect on the Union and ultimately on the casino industry to become manifest before we can act. The fact of influence by a person such as Scarfo is inimical to the policy of the Act and gaming operations.

Briefly reviewing the evidence with specific reference to Gerace, Scarfo kept Gerace's name, and those of his mother and "girl" on his telephone list in code. Gerace covertly put up $10,000 in bail for Scarfo, Leonetti and Merlino. In three and one-half months at 26-28 North Georgia Avenue, Salerno observed frequent contact between Gerace and Scarfo, including private conferences and a call returned

from a telephone booth. Gerace appointed Materio, Lumio, Daidone, Erace and Lentino to their Union posts. As president of the Union he was surely involved in the various business dealings with Scarfo associates. In short, it is clear to us his association with Scarfo is of such a nature as to create a reasonable belief that it is inimical to the policy of the Casino Control Act and to gaming operations. Such an association flies in the face of the stated statutory and policy considerations and cannot be accepted.

As to Materio, his name was on Scarfo's telephone list, although he claimed to have no idea why. He put up his house as bail for Leonetti and Merlino, although he claimed he barely knew them. He testified that he put up his house as a favor to Catherine Scarfo, but offered no reasonable explanation of

why he would take such action on her behalf. He proposed that the Union pay Toro Construction over $10,000 but had no idea if Toro had done any work justifying the payment. He moved before the Executive Board to authorize the appointment of Daidone to the Union staff, but claimed that when he did so he knew nothing about Daidone. Leonetti made his proposal to inflate the bill for the plumbing at the Union headquarters in front of Materio, and Materio said nothing. The minutes of the Executive Board meetings show that Materio, to give a few examples, moved to accept the appointment of Lumio as secretary-treasurer (C3, minutes of 8/13/79), nominated Lumio to run for election as secretary-treasurer (C3, minutes of 10/1/79), seconded the nomination of Gerace to run for president (C3, minutes of 10/1/79), moved to

authorize the officers to appoint Daidone as business agent (D125, minutes 12/29/80), moved to accept the appointment of Daidone to the Executive Board (C3, minutes of 4/28/81), moved to accept the appointments of Daidone as vice president and Lentino as officer manager (C3, minutes of 6/8/81), moved to approve the appointment of Erace to the Executive Board (C3, minutes of 12/14/81) and nominated Erace for election to the Executive Board (C3, minutes of 6/7/82).

In Materio's case we do not have evidence of direct, frequent contact with Scarfo, et al. However, the nature of their relationship is revealed by the telephone list, the bail and the incident involving the plumbing at the Union headquarters. When Materio's actions as an Executive Board member are viewed in light of this relationship, we must conclude that an association inimical to

the policy of the Act and to gaming operations exist.

We therefore find that Frank Gerace and Frank Materio are disqualified under section 86(f).

There is one other alleged association which the Division urges as a section 86(f) disqualifier, i.e., that between Gerace and Eugene Boffa, to which we will now turn.

VII. ASSOCIATION OF GERACE AND BOFFA

Eugene Boffa was for some years engaged, through a variety of corporations, in the labor leasing business. He would, for a fee, provide a business, such as a trucking company or a hotel, with all of its workers. The workers would be employed by Boffa, and he would handle the collective bargaining, labor disputes, payment of wages and benefits, etc.

Labor leasing can be a legitimate business, but it was not in Boffa's case. he employed workers from Teamsters Local 326 in Delaware (T1270) and made regular payments to the Local's president, Frank Sheeran, in exchange for which Sheeran did a variety of things favorable to Boffa and inimical to his Union's members. In short, Boffa was buying labor peace (T1275-1277). As a result of their activities Boffa and Sheeran were convicted on a variety of federal criminal charges (D86). Boffa was sentenced to 20 years in prison and Sheeran was sentenced to 18 years (T1282). It seems clear that Boffa is a career offender.

The Division placed in evidence transcripts of two taped conversations, one between Charles Allen and Sheeran (D81) and the other between Allen and Boffa (D84). Both were made while Allen

was carrying a recorder placed on his person by the FBI.

The taped conversation between Allen and Sheeran occurred on December 1, 1978. They discussed labor leasing arrangements involving, inter alia, hotels (D81, at 4-6). The only reference of direct relevance to this case is the following:

> FS: Yeah, I want, I just, I gotta meet this guy from Local 54, Frank Recia is his name?
> CA: Yeah.
> FS: You know him?
> CA: Yeah.
> FS: Frank--I can't pronounce his name. I got a name, here. I got to meet Ralphie tomorrow at 12 o'clock. [D81, at 5]

It seems reasonable to conclude that the "guy from Local 54" is Gerace, who at that time was president of the Local. It also seems clear that "Ralphie" is Natale, who was then secretary-treasurer of Local 33. Sheeran and Natale were corrupt labor leaders. However, the fact that Sheeran

was going to meet Gerace does not justify an inference that they were meeting for venal purpose. The tape gives no indication of Sheeran's purpose in meeting "Frank Recia," and therefore this tape is not of great significance.

On the Allen-Boffa tape there is a clearer and potentially more damaging reference to Gerace. The transcript of the tape reads:

> "EB: [Unintelligible] You know, I don't bother like, even with Atlantic City -- I'll give you an example -- this guy is hot shit there -- the union guy down there. He was a nice guy so come -- I said, OK "Here, buy yourself something."
> CA: What union? Teamsters?
> EB: Uh, no. the other guy, uh Frankie Gerace.
> CA: Oh. You want something' done with him?
> EB: No, he's alright.
> CA: Okay, Okay
> EB: I said "Here, buy yourself something" [Unintelligible] I says, "this has nothing to do with this, alright?" So

he tells them that I gave him something, see. So he says, "Hey, don't give them nothin'." "It goes to us." "Hey," I said, "I don't give a shit. I haven't given him anything." it's just like if you came into me and, uh, I threw you a tip or something. I'm not, uh, I'm not paying you off. I'm not saying I give it to you, I don't want to give it to them. It had nothing to do with them. He didn't use his head. So, now I can't give him nothing even if I want to.

CA: Hmm. And he told them. Who, who did he tell?

EB: He told Frank. [D84, at 22-23]

The Division presented other evidence indicating that Bofa had a labor leasing agreement with Penthouse International to supply workers to the Holiday Inn in Atlantic City, and that the Holiday Inn was a signatory to the non-casino hotel contract with Local 54. On the basis of this evidence and the above-quoted conversation, the Division

asks us to find that Boffa made a payment to Gerace "for the purpose of purchasing labor peace at the Penthouse Holiday Inn project, and that this payoff may have manifested a corrupt agreement between Gerace and Boffa to enrich themselves, possibly at the expense of Local 54 employees" (Brief at 48). If the Commission did make such a finding, it would be dispositive on the issue of Gerace's disqualification, as it would evidence not only an association with a career offender, but an association for a corrupt purpose which would certainly satisfy the "inimical" requirement of section 86(f). In addition, if Boffa was supplying workers to the Holiday Inn and Gerace was representing those workers, any payment by Boffa to Gerace, regardless of its purpose, would be a misdemeanor under 29 U.S.C.A. § 186. Commission of this misdemeanor, even without prosecution,

might also disqualify Gerace under sections 86(g) and 86(c)(4) of the Act.

However, in our opinion the Division's interpretation of the facts is not supportable. The first question in this regard is whether the record justifies a finding that Boffa in fact gave money or some other thing of value to Gerace. Certainly Boffa seems to be saying that he gave Gerace money. Allen told the Senate that "Eugene Buffalino [sic] ... mentioned that he gave gift, meaning money to Frank Gerace, and that Frank Sheeran, the man I work for, got mad at him ..." (R8, at 85). Thus, Allen apparently understood Boffa to be saying that he gave money to Gerace. However, the question is whether Boffa's statement to Allen can form the basis for finding as fact that a payment was made.

Boffa's statement is obviously hearsay, and thus can support a finding of

fact only if it fits within one of the exceptions to the hearsay rule or if the Commission finds it to be reliable evidence under section 107(a)(6) of the Act.

Only one of the exceptions to the hearsay rule has any possible relevance here, namely, Evid. R. 63(10), which provides:

> A statement is admissible if at the time it was made it was so far contrary to the declarants pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true..."

Bearing in mind that we are dealing here with a transcript of a conversation between a career criminal and a career criminal-turned-informer, in our view it

is not clear that Boffa made a declaration against interest within the meaning of the above-quoted evidence rule. Boffa would probably not have believed that his statement to Allen would subject him to pecuniary or proprietary loss, subject him to civil or criminal liability, or expose him to "hatred, ridicule or social disapproval in the community."

The question then becomes whether Boffa's statement is nonethless reliable within the parameters of section 107(a)(6). Again, this was a conversation between two career criminals. One of the participants, Allen, was lying throughout the conversation because he had a ulterior motive, namely cooperating with the FBI. There is no way of knowing what motive Boffa may have had in talking to Allen. In our view responsible persons conducting serious affairs would not rely on the

statements made by Boffa to Allen on this tape.

Even if we were to find that a payment was made, other factual determinations would have to be made. For instance, it would have to be determined whether, as the Division urges, that the payment was a payoff for labor peace. Boffa clearly seems to be saying to Allen that he was not paying off Gerace. The Division is apparently asking the Commission to accept Boffa's statement that he have money to Gerace but to reject his statement that it was not a payoff. We are not aware of any basis to support this kind of selective acceptance of Boffa's comments.

Furthermore, the Division's argument is premised on the assumption that Boffa supplied workers to the Holiday Inn at a time when the Holiday Inn was a Local 54 shop. There is evidence in the record

from which it could be found that a company controlled by Boffa, American Labor Services, did supply workers to the Holiday Inn, but it is questionable whether the record would support a finding that American Labor Services used Local 54 employees.

FBI agent Tamm testified that he did not know if there was ever a collective bargaining agreement between American Labor Services and Local 54, but that he assumed there was because of the statement in the Allen-Sheeran tape that Sheeran was going to "meet this guy from Local 54, Frank Recia" (T1356-1357); T1362; D81, at 5). However, during cross-examination Tamm agreed that the Allen-Sheeran tape indicated that whatever payoffs were being made, at the Holiday Inn or elsewhere, were being made to Sheeran (T1335).

The Division correctly points out that the Local 54 Executive Board minutes

of 9/12/77, 10/3/77, 12/5/77, 2/13/78, 4/3/78, 9/5/78, 3/5/79, and 4/4/79, contain references to arbitration and contract matters concerning the Holiday Inn, and that the minutes of 9/10/79 contain a reference to an agreement with Penthouse regarding welfare benefits. It thus seems clear that there was a collective bargaining agreement between Local 54 and the Holiday Inn, and specifically between Local 54 and Penthouse as the owner of the Holiday Inn. However, the question is whether the relationship between the Holiday Inn and Local 54 continued during the time that American Labor Services supplied employees to the hotel. On this question the deposition of Gerald Adler, a former Penthouse employee, is the only evidence.

Adler said that he attended a meeting sometime around April or May of 19[illegible], at which Boffa proposed a labor

leasing agreement between American Labor Services and Penthouse (D124, 87-89). Adler identified a memo which he wrote after that meeting. The memo is dated May 1, 1978, and states: "Boffa will: Negotiate details of labor contracts; notify union and association that we withdraw; negotiate new contracts with operating engineers and casino workers; do background checks; maintain labor pool; (D124, at 96-97). The record does not contain any explanation of the phrase "notify union and association that we withdraw," although this might indicate that the Holiday Inn was withdrawing from the industry-wide contract with Local 54.

Adler's deposition establishes that Penthouse did enter into a contract with American Labor Servics, but does not establish when the contract commenced or when it ended. He was shown an unsigned contract dated July 9, 1978, and said that

it "could have been" a contract submitted by Boffa (D124, at 97-98). He also identified a letter which he sent to Boffa suggesting changes in the contract Boffa had proposed. The letter is simply dated "October." Adler could not understand the date because he left Penthouse's employ in late September (D124, at 102). He "supposed" that the letter was sent sometime in July, August or Sepember 1978 (D124, at 103). Adler said that he did not remember when American Labor Services actually started supplying workers at the Holiday Inn but that he had "a feeling they would have waited until something was signed before starting" (D124, at 102). Finally, Adler said that "several months" after he left Penthouse he heard that they had "dropped" American Labor Services (D124, at 133-134).

It thus appears that Boffa supplied workers to the Holiday Inn for some

relatively brief period of time during the latter half of 1978. However, it seems to us speculative to conclude that Boffa's company utilized Local 54 workers.

Even if it is assumed that American Labor Services had a collective bargaining agreement with Local 54 during the time that it supplied workers to the Holiday Inn, and also assumed that Boffa made a payment to Gerace, the Division's argument requires the further assumption that the payment occurred during the time that American Labor Services was supplying workers to the Holiday Inn. However, as previously explained, the record does not definitely establish the time during which the contract between American Labor Services and Penthouse was in effect or the time of the alleged payment to Gerace. The contract between American Labor Services and Penthouse was probably in effect for some brief period during the

second half of 1978. The taped conversation between Boffa and Allen occurred on February 2, 1979. Thus a payment may may have been made during the time that the contract was in effect, but again the Commission is left to speculate.

We, therefore, do not think this evidence provides a basis for disqualifying Gerace.

Kirkland and LaSane

The first question with respect to Kirkland and LaSane whether they are officers, agents or principal employees of Local 54 within the meaning of section 93.

N.J.A.C. 19:41-12.1 defines "agent" as:

> any person, whether compensated or not, who is authorized or allowed to represent a labor organization in any employment matter relating to employees licensed under the act and employed by a casino hotel or casino licensee, or who undertakes on behalf of the labor organization to promote,

> facilitate or otherwise influence the relations between the labor organization and the casino hotel or casino licensee.

Eli Kirkland has been employed by Local 54 for approximately two and one half years (T215) and receives a salary of $400 a week (T216). He handles grievances emanating from union members employed in kitchen and maintenance positions in the nine operating casino hotels (T216, 218). Kirkland testified that he attends hearings with union members and attempts to resolve their differences with management. (T216).

When asked what the title of his job was, Kirkland answered, "I guess you could call me like an agent" (T248). Kirkland identified himself as an "agent" on his Labor Organization Individual Disclosure Form filed with the Commission (D8).

Karlos LaSane has been employed with Local 54 since May 4, 1981 and receives $410 a week in salary (T287-288). LaSane represents union members employed at Bally's Park Place and Caesars Boardwalk Regency at grievance hearings. Mr. LaSane testified that he attends grievance hearings, speaks on behalf of union members and attempts to resolve whatever problems exist between the employees and management (T290).

LaSane contended that he receives an average of fifteen calls a day from Union members "seeking information on filing grievances, interpretation of the contract and what Management is doing or not doing in respect to the Collective Bargaining Agreement" (C4). He added that he places "an average of five calls a day to Management trying to resolve grievances without hearings to the benefit of [Union] members..." (C4). LaSane described his

responsibilities as essentially the same as Kirkland's (T291).

Furthermore, LaSane has been informally designated by Gerace as Local 54's affirmative action officer (T327). In this capacity, LaSane handles discrimination complaints which emanate from any of the casino hotels (T337-338). LaSane testified that he has familiarized himself with the rules and regulations pertinent to affirmative action (T327) and has acquainted himself with agencies and organizations which may complement his efforts in resolving discrimination complaints (T328, 338).

LaSane identified himself as an "agent" on his Labor Organization Individual Disclosure Form (D1).

We find that Kirkland and LaSane are both "agents" within the meaning of N.J.A.C. 19:41-12.1. It is clear to us that both represent Union members within

the casino industry in employment matters. Although the Division contends that they are also "principal employees," we will not decide this issue.

Since Kirkland and LaSane are agents, we must determine whether either is disqualified pursuant to section 86.

Kirkland has a criminal record which consists of five convictions. We note that Kirkland filed his Labor Organization Individual Disclosure Form with the Commission on June 19, 1981. Consequently, section 86(c)(1) containing a list of disqualifying offenses from the "New Jersey Code of Criminal Justice," L. 1978, c. 95 (Title 2C of the New Jersey Statutes) is controlling. See, In the Matter of the Application of Robert A. Ferrin for Licensure as a Casino Employee, Docket No. 79-EA-207 (1981) at 10-12.

On May 7, 1964, Kirkland was convicted in United States District Court

for the District of New Jersey of unlawfully selling a narcotic drug, namely 168 milligrams of cocaine, in violation of 26 U.S.C.A. §§4704(a) and 7237(a) (D3). This offense is comparable to a high misdemeanor under N.J.S.A. 24:21-19(b)(1). See, N.J.S.A. 24:21-6(c)(4). Accordingly, we find that this offense is a listed disqualifying offense pursuant to section 86(c)(3) of the Act.

On November 1, 1968, Kirkland was convicted of possession of narcotics in violation of N.J.S.A. 24:21-20 (D4). This offense is not listed as a disqualifying offense in sections 86(c)(1), or (3).

On July 8, 1969, Kirkland was convicted of grand larceny contrary to the provisions of N.J.S.A. 2A:119-2 (D5). Although this offense is listed in section 86(c)(2), we find insufficient support in the record to conclude that it is a

disqualifying offense pursuant to section 86(c)(1).

In 1975, Kirkland was indicted on six counts for sale of lottery tickets, possession of lottery paraphernalia and engaging as a lottery clerk in violation of N.J.S.A. 2A:121-1 and 3 (D6). The record of the criminal proceeding indicates that Kirkland was found guilty and sentenced to "a term of not less than two and no more than three years on each count, sentence to run concurrently..." (D6). We are unable to tell with certainty from this record the offenses for which he was convicted or much of the factual circumstances surrounding these offenses. Section 86(c)(2) indicates that the commission of any offense under 2A:121-1 et seq. constitutes a disqualifying offense, but we are unable to find that these offenses are

disqualifying pursuant to section 86(c)(1).

Lastly, on September 15, 1976, Kirkland pled guilty to possession of lottery slips and permitting a lottery on his premises in violation of N.J.S.A. 2A:121-3(b) and (c) (D7). Again, the record will not permit us to convert these offenses to comparable offenses listed in section 86(c)(1).

Since Kirkland has four convictions for offenses which are not specifically disqualifying, we would ordinarily undertake an "inimical analysis" pursuant to section 86(c)(4) which considers whether these offenses indicate that Kirkland's licensure would be inimical to the Act or to casino operations. Such analysis would consider a number of factors including the nature of the offense, the surrounding events, the remoteness of the offense, and the

offender's conduct since that offense. In the Matter of the Application of Resorts International for a Casino License, Docket No. 79-CL-1 (1979) at 15. However, in light of our subsequent discussion and conclusion, we think it is unnecessary to reach specific findings in this regard.

Section 93(b) provides that "[t]he commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require."

Furthermore, section 86(c)(4) states:

> ...the automatic disqualification provisions of this subsection shall not apply with regard to any conviction which did not occur within the 10-year period immediately preceding application for licensure and which the applicant demonstrates by clear and convincing evidence does not justify automatic disqualification...

Kirkland was released from prison sometime in 1978 (T225, 257). The record indicates that since that time he has been wholly free from any criminal involvement. Kirkland is now fifty years of age (T254; D8).

Carroll Edmonson, executive director of the Atlantic City Human Relations Commission, testified that he has known Kirkland for approximately four years (T370) and has found him to be an honest and forthright individual (T371).

Donald Young, an officer in the National Society of Volunteers of America, also testified on behalf of Kirkland. The Volunteers of America operate several half-way houses which attempt to help ex-offenders become assimilated into society (T385). Mr. Young stated that he had known Kirkland for a little less than a year (T390), but in that short span Kirkland had been instrumental in

assisting several ex-offenders procure employment in the casino industry (T386). Young stated that he had a high opinion of Kirkland and felt that he was an excellent example for the young men who have just been released from prison and are attempting to rebuild their lives (T387).

Lastly, Arrawanna Allen, an affirmative action specialist with the City of Atlantic City, indicated that she has worked with Kirkland on several occasions and always found him to be courteous and professional in their dealings (R2).

The Commission was impressed by Kirkland, and found him to be a man who wished to put his criminal experiences behind him and live a better life. His testimony was entirely credible. We are persuaded that he has rehabilitated himself and should be permitted to continue to work in his current position.

Accordingly, we find that there is clear and convincing evidence that Kirkland's automatically disqualifying conviction which occurred more than 10 years before he filed his application does not justify disqualification under section 86(c)(4). We further resolve to waive Kirkland's other offenses pursuant to section 93(b).

The Division also alleges that Kirkland should be disqualified on the basis of a nondisclosure pursuant to section 86(b). Kirkland disclosed only his 1969 larceny conviction and his 1975 lottery conviction in response to question 10 on his Labor Organization Individual Disclosure Form, which requests an applicant to report all criminal convictions (D8). Kirkland explained that Lumio had instructed him, when he gave him the form, to put down his most recent convictions (T244). We note that question 10 on the registration form provides space

for only two answers. However, a full page is provided at the end of the form for the purpose of supplementing incomplete answers (see, D8, at 11).

It is well settled that nondisclosure of criminal offenses on an application form will support disqualification pursuant to section 86(b) when the nondisclosure is intentional or evinces a conscious disregard for the regulatory process. In the Matter of the Application of Resorts International Hotel, Inc., for a Casino License, Docket No. 79-CL-1 (1979), at 13.

We believe that the nondisclosures were inadvertent. We also note that Kirkland revealed two of his most recent and most serious offenses. Kirkland indicated that he was not attempting to conceal his undisclosed convictions. We think this testimony was candid and honest and we have already found him to be a

thoroughly credible witness and see no reason to disturb that conclusion here.

Lastly, the Division asserts that Kirkland is a career offender and should be disqualified on the basis of section 86(f). In view of our discussion above, we think little need be said with regard to this issue beyond the simple conclusion that we do not believe that Kirkland should be disqualified as a career offender. Accordingly, with regard to Kirkland, we find no valid basis for his disqualification.

LaSane was convicted in United States District Court for the District of New Jersey on May 21, 1973, of interference with commerce (extortion), aiding and abetting and conspiracy in violation of 18 U.S.C.A. §1951 (D2). He was a Commissioner of the City of Atlantic City, specifically the Director of Parks and Public Property, from May 21, 1968

until the time of his indictment (D2). According to the indictment, LaSane obstructed and delayed the construction of public projects, purchases of goods, property and services, and the licensing of firms which sought to do business in the City of Atlantic City in order to obtain monies from contrators, engineers, property owners, suppliers and licensees "by the wrongful use of fear and under color of official right" (D2). LaSane served one year and twenty-one days for this offense (T329).

The Division contends that this offense disqualifies LaSane pursuant to sections 86(c)(1), (c)(4) and (e). However, during the course of the hearing it came to light that the Division had apparently taken a different position on the matter in considering another application submitted by LaSane (C2). LaSane had previously submitted an

application for a casino hotel employee license. The application was filed with the Commission on April 7, 1981 (C1). LaSane disclosed his conviction on this application form just as he did on his Labor Organization Individual Disclosure Form (D1).

Some background is necessary to fully understand what occurred. On February 15, 1982, amendments to the Casino Control Act became effective which eliminated the licensure requirement for casino hotel employees and established a registration requirement in its stead. L. 1977, c. 110. By virtue of these amendments, upon petition by a casino licensee or temporary casino permittee a person could begin employment as a casino hotel employee after he has filed an application for casino hotel employee registration. See, N.J.S.A. 5:12-91(f). Under the registration system the

evaluation of the suitability of a casino hotel employee occurs after he is eligible for employment, rather than before, as under the licensure system.

The amendments to the Act further provided that any person who had a completed application for a casino hotel employee license pending before the Commission would be considered registered. N.J.S.A. 5:12-91(f). LaSane therefore became registered with the Commission and eligible for employment on the effective date of the amendments.

In an internal memorandum dated March 24, 1982, the Division indicated that it had reviewed LaSane's qualifications and determined that there was no cause to disturb his status as casino hotel employee registrant (C2).

The Division's position that LaSane is qualified as a hotel registrant was not taken as part of the hearing on the

instant matter. That position was merely expressed in an internal Division memorandum. None of the parties took any action in reliance on the Division's position with regard to LaSane's suitability as a hotel registrant or would in any way be prejudiced by allowing the Division to take a different position as to LaSane's fitness to serve as a union agent. We find that the Division memorandum listing LaSane as a satisfactory registrant has no bearing on the matter before us. Accordingly, we now consider whether LaSane's conviction will disqualify him pursuant to the provisions of the Act.

The Division contends that LaSane is disqualified pursuant to section 86(c)(1) since his federal conviction is analogous to listed disqualifying offenses, namely, N.J.S.A. 2C:5-2 (conspiracy), N.J.S.A. 2C:20-5 (theft by extortion), N.J.S.A.

2C:27-2 (bribery in official and political matters), N.J.S.A. 2C:27-4 (compensation for past official behavior), N.J.S.A. 2C:27-6 (gifts to public servants), N.J.S.A. 2C:27-7 (compensating public servant for assisting private interests in relation to matters before him), N.J.S.A. 2C:30-2 (official misconduct) and N.J.S.A. 2C:30-3 (speculating or wagering on official action or information). The Division further contends that LaSane is disqualified on the basis of sections 86(c)(4) and 86(e). LaSane filed his Labor Organization Individual Disclosure Form with the Commission in June 1981 (D1).

As previously indicated, LaSane has been convicted of interference with commerce (extortion), aiding and abetting and conspiracy. We find that the offense for which LaSane was convicted is the equivalent of a violation of N.J.S.A.

2C:20-5(d), which is a disqualifying offense listed in section 86(c)(1). We find that LaSane was acting in his official capacity as a Commissioner of the City of Atlantic City when he committed the acts which constitute a federal offense. We further note the repetitive nature of his criminal acts.

LaSane was convicted of a particularly noxious crime in our view. He had obviously attained a measure of success as a City Commissioner, but he perverted his office and abandoned the trust reposed in him by the voting public.

Carroll Edmonson, mentioned above, testified on behalf of LaSane. Edmonson stated that LaSane has an excellent reputation for honesty and integrity in the community (T373). He added that it was his view that LaSane was thoroughly rehabilitated (T374).

Furthermore, several letters were introduced into evidence on behalf of LaSane (R1, R2, R3, R4, R5, R6 and R7). These letters attest to LaSane's good character, courage and integrity. The letters were authored by: Gene L. Hudgins (R1), Arrawana Allen (R2), Isaac S. Cole, Pastor of the Second Baptist Church in Atlantic City (R3), Barbara L. Hudgins (R4), Pierre Hollingsworth, president of the Atlantic City branch of the NAACP (R5), Carroll Edmonson (R6), and Reverend Leroy T. Griffith (R7).

We have listened to LaSane testify before us and have assessed his credibility. We are not convinced that the public policy of the Act or the interests of justice require a waiver of his disqualification.

Considering our conclusion, we believe it is unnecessary to determine whether LaSane's federal conviction is

analogous to the host of other listed offenses proposed by the Division. Nor do we deem it necessary to consider disqualification under section 86(c)(4) or 86(e).

Conclusion

For all of the reasons herein stated we find Frank Gerace and Frank Materio are disqualified under section 86(f) and that Karlos LaSane is disqualified under section 86(c). We wish to afford all interested parties a reasonable opportunity to effect the removal of Gerace, Materio and LaSane as officers, agents or principal employees of Local 54 before taking remedial steps as provided by section 93(b). We will therefore issue an order providing that, in the event Gerace, Materio or LaSane is an officer, agent or principal employee of Local 54 as of October 12, 1982, Local 54 will be thereafter prohibited from receiving dues

from any employee licensed or registered under the Casino Control Act and employed by a casino licensee or its agent. Our order will further require the parties to submit briefs by October 5, 1982, addressing the interpretation and applicability to this case of the additional statutory prohibitions against "administ[ration of] any pension or welfare funds." N.J.S.A. 5:12-93(b). In the briefs the parties shall discuss what discretion the Commission may exercise in regard to the remedial provisions of section 93(b), whether the cessation of dues collection and the cessation of administration of pension and welfare funds are alternative remedies, and whether in fact Local 54 is engaged in the administration of pension or welfare funds. On this last point the parties may make whatever written factual submissions they deem appropriate. In its brief the

Division shall make clear what remedial action it will request the Commission to take in the event that Gerace, Materio or LaSane is an officer, agent or principal employee of Local 54 as of October 12, 1982.

SEPARATE OPINION OF COMMISSIONER JACOBSON

I respectfully disagree with the majority opinion insofar as it finds Frank Gerace, Frank Materio and Karlos LaSane disqualified under sections 86(c) and (f).

Frank Gerace and Frank Materio

I agree with the findings of the majority concerning the organized crime involvement of Nicodemo Scarfo, Nicholas Virgilio, Philip Leonetti, et al. The evidence in this respect is conclusive.

It is also apparent that an association between Frank Gerace, Frank Materio and Nicodemo Scarfo has existed.

The issue to be determined by this Commission is whether this association is "inimical" to the policy of the Casino Control Act and to gaming operations.

In my judgment, the evidence submitted in this proceeding is insufficient to justify such a conclusion.

It is always distressing to observe any degree of association between law-abiding citizens and mob-related felons. It is particularly gnawing when high-ranking union officials, charged with the obligation of serving as trustees for the welfare of their members, permit such associations to exist, for any reason.

One would normally expect militant trade union leaders dedicated to the principles of democratic trade unionism to seek close, personal relations with individuals and organizations determined to fight for social and economic justice, not to have associations with mob-related, tyrannical oppressors, motivated by personal greed.

The association of Frank Gerace and Frank Materio and the others whom they have appointed to positions in Local 54 to Scarfo, et al. is distressing. However, the evidence concerning their associations

does not lead me to conclude that the unseen hand of Scarfo is at work in this Union.

Each of the individuals appointed to positions within the Union has long been at work in the industry and each has emerged from the Union's rank and file membership.

Gerace was a waiter (T1778) and rose through Local 508 to his present position in Local 54. Materio was and still is a bartender (T1599). Lumio (T1779) and Daidone (D126, at 25) were bartenders. Erace was a maitre d' (T1725). There is no probative evidence that Scarfo caused these persons to be appointed to their positions with the Union or has had any influence over the manner in which they have performed their union duties. Local 54 presented sixteen witnesses, including members of the union employed in casino hotels, other respected union leaders,

casino industry representatives, attorneys specializing in labor law and persons active in community affairs, all of whom praised Local 54 and its leadership as active, aggressive and effective representatives of the membership. This evidence was uncontradicted.

All of these witnesses portrayed Gerace as a vigorous and dedicated union leader (T2186; 2211). He was further characterized as a tough negotiator with extensive knowledge of the casino industry (T2037-2038).

Both Gerace and Materio were described by three members of the Union as always being helpful and receptive to the Union membership and as having unquestioned reputations for honesty.

Father Vincent Pasquale, a Catholic priest and director of the Alcoholic Council Service, testified that Gerace has

an untarnished reputation for honesty and integrity.

As for the business associations, John Rich of the Bricklayers Union, who is also president of the Building Trades Council of Atlantic and Cape May Counties, said that Toro Construction is a large and well-run business, and "a contractor that bids legitimately for legitimate jobs" (T2216; see also, T2217-2218). Rich also said Toro was one of four or five union contractors he recommended to Gerace for the headquarters renovation job. The job was apparently awarded by bid (T1693), and there is no reason to question the bona fides of the building process or of the cost of the renovations.

As to Affiliated Leasing, Robert Wayne testified that the vehicle leases were entirely legitimate.

With regard to the other two business associations, Casale and Sausto,

there is likewise no evidence of impropriety.

In summary, there has been no reliable or substantial evidence before this Commission of any influence, any impropriety, or any crime.

In fact, the majority so states:

> It is true that no direct evidence was presented during these proceedings that any of the appointments or business associations resulted from Scarfo's influence and that in a few instances, such as Toro Construction, there is some contrary evidence.
>
> We are also aware that the record is silent as to whether any of the Scarfo-related appointees have acted illegally or otherwise improperly in the conduct of the Local's affairs or that any of the business associations were other than legitimate.

While an association between Gerace, Materio and Scarfo, et al. has been established, there is no proof anywhere in this proceeding that any of the appointees

has conducted any Union business in a manner violative of the law, or contrary to the best interests of the membership of Local 54, or that any of the business transactions were in any way improper. Nor is there anything else that would clearly indicate the fact of influence.

Given these facts and these conclusions, by what stretch of logic does the majority determine that any of these associations is "inimical" to the policy of the Casino Control Act or gaming activities in New Jersey?

The conclusion one must reach is that the majority believes that while the Scarfo influence on Local 54 cannot be proved by hard evidence today, there is always the possibility that his association with Gerace and Materio could be "inimical" at some point in the future. If this is the logic of the disqualification order, it is based upon

an abandonment of American democratic traditions.

Are we to condemn an innocent individual today, because at some distant future time, he may commit an impropriety?

The Casino Control Act states:

> An integral and essential element of the regulation and control of casino facilities by the State rests in the public confidence and trust in the credibility and integrity of the regulatory process. [N.J.S.A. 5:12-1(b)(6)]

If this Commission employs the faulty premise of guilt-by-association, discards the traditional presumption of innocence, and condemns on the testimony of faceless, unexamined informers, we will do more than undermine the credibility and integrity of the regulatory process.

We will do violence to the credibility and integrity of the democratic process.

Finally, I agree with the majority that no inferences can or should be drawn from Gerace's failure to testify. Gerace has a right to remain silent, a right which the Supreme Court has described as an "essential mainstay" of our Constitutional system, Malloy v. Hogan, 378 U.S. 1, 7 (1964) and, based on the record before us, I do not think his constitutionally-protected silence should be given any evidential significance.

In its reply brief (page 9), the Division argues that Gerace's answers to the following questions would clearly indicate the extent of any Scarfo influence:

> Who would know whether or not meetings or phone calls with Scarfo ever took place?
>
> Who would know why such contacts occurred and what was discussed on each occasion?
>
> Who would know whether such contacts had any influence on

> the policies or actions of Local 54, and whether they presented any danger to the casino gaming industry?

And then the Division reasons:

> The answer to all these questions is that Frank Gerace would know, but he refuses to answer questions on these topics, contending that to do so would incriminate him.

The Division is correct in posing these questions but less than persuasive in reaching such a conclusion in its reply brief.

The fact is that Gerace did testify for four days at a deposition conducted by the Division. The deposition testimony was taken under a grant of immunity, see, N.J.S.A. 5:12-67, and the transcript was sealed.

Thus, this Commission has had no access to, and therefore has no knowledge of Gerace's deposition testimony. But, the Division knows how Gerace answered every question posed to him during that

deposition and could easily have procured his testimony for the Commission's consideration by making another request for immunity, which the Commission obviously would have granted. Our ability to afford all parties a full and fair hearing would have been greatly enhanced if the Division had requested immunity and thus, provided us with Gerace's testimony.

Karlos LaSane

I endorse much of the majority's opinion with regard to LaSane. However, I would reach a different conclusion concerning his rehabilitation.

LaSane was convicted on May 21, 1973. This is his only criminal offense in a life spanning fifty years. LaSane testified that he served one year and twenty-one days for the offense and was released sometime in 1975 (T329). He also testified that he successfully completed

his parole approximately two years later (T330).

Since that time, LaSane has been free of criminal involvement. LaSane testified that following his release from prison he became employed as a counsellor with the Narcotic Addicts Rehabilitation Center Organization (NARCO) (T322), and that he worked for this organization for four years (T324).

LaSane was then employed by the Atlantic Housing Development Corporation as a field representative (T325). He stated that this program was funded by the federal government and when the funds dried up he became employed with the American Civil Liberties Union (T324).

Following his employment with the ACLU, LaSane collected unemployment (T325). Then, in May 1981, he commenced his present employment with Local 54. Furthermore, as the majority notes, seven

members of the Atlantic City community have indicated their support for LaSane and offered their opinion that he is a man of honesty and integrity.

I find that the singularity of the offense, although admittedly a serious crime, the nearly continuous work record since his release, and the contemporaneous, uncontradicted statements made on his behalf, indicate that LaSane does not warrant so harsh a penalty as the majority prescribes. I would find that LaSane is rehabilitated and I would waive his disqualification pursuant to section 93(b).

Conclusion

For all of the above reasons, I find that the Division has not proven that Gerace and Materio are disqualified under section 86(f) or that LaSane is disqualified under section 86(c).

Commissioner Thomas joins Commissioner Jacobson's opinion with regard to Karlos LaSane.

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION

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| IN THE MATTER OF THE HOTEL | : | |
| AND RESTAURANT EMPLOYEES | : | |
| AND BARTENDERS INTERNATIONAL | : | ORDER |
| UNION LOCAL 54 | : | |

This matter having been opened to the Commission by the Division of Gaming Enforcement, Robert Sturges, Acting Director, appearing, and Bernard N. Katz, Esq., Meranze, Katz, Spear & Wilderman, Esqs., having appeared on behalf of Hotel and Restaurant Employees and Bartenders International Union Local 54, and Ronald F. Kidd, Esq., Duane, Morris & Heckscher, Esqs., having appeared on behalf of Frank Gerace, and the Commission having held a hearing, and having found that Frank Gerace and Frank Materio are disqualified under N.J.S.A. 5:12-86(f), and that Karlos

LaSane is disqualified under N.J.S.A. 5:12-86(c), and good cause having been shown,

IT IS on this 28th day of September, 1982, ORDERED that: Frank Gerace, Frank Materio and Karlos LaSane be removed as officers, agents or principal employees of Hotel and Restaurant Employees and Bartenders International Union Local 54 by October 12, 1982; and

FURTHER ORDERED that: In the event Frank Gerace, Frank Materio or Karlos LaSane is an officer, agent or principal employee of Local 54 as of October 12, 1982, Local 54 will thereafter be prohibited from collecting dues from any employee licensed or registered under the Casino Control Act and employed by a casino licensee or its agent; and

FURTHER ORDERED that: By October 5, 1982, the parties shall submit briefs in accordance with the terms of the opinion issued this day by the Commission.

NEW JERSEY CASINO CONTROL COMMISSION

By_____
Don M. Thomas, Acting Chairman

_____
Martin B. Danzigler, Commissioner

_____
Carl Zeitz, Commissioner

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Madeline H. McWhinney, Commissioner

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION

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| IN THE MATTER OF THE | : | |
| REGISTRATION OF HOTEL AND | : | |
| RESTAURANT EMPLOYEES | : | ORDER |
| AND BARTENDERS INTERNATIONAL | : | |
| UNION LOCAL 54 | : | |

This matter having been opened to the Commission by the Division of Gaming Enforcement, by petition for a supplemental order, and the Commission having considered the petition, the responses filed by counsel for Hotel and Restaurant Employees and Bartenders International Union Local 54, and counsel for Frank Gerace, Frank Materio and Karlos LaSane, as well as the argument of counsel at the public meeting of September 12, 1984,

IT IS on this 12th day of September, 1984, ORDERED that Frank Gerace, Frank materio and Karlos LaSane cease acting as officers, agents or principal employees of Hotel and Restaurant Employees and Bartenders International Union Local 54 by September 28, 1984.

NEW JERSEY CASINO CONTROL COMMISSION

By: _____
Walter N. Read, Chairman

Supreme Court, U.S.
FILED
MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1308

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

FRANK GERACE and FRANK MATERIO,

*Petitioners,*

v.

STATE OF NEW JERSEY, CASINO CONTROL COMMISSION and STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,

*Respondents.*

## BRIEF OF THE NEW JERSEY CASINO CONTROL COMMISSION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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## Questions Presented

1. Does the First Amendment guarantee the right of officials of a casino industry labor union to conduct union affairs under the influence of organized crime?

2. Is a statute which provides for the disqualification of casino industry labor union officials who associate with a "career offender" in a manner which is reasonably found to be "inimical" to the policies of the Casino Control Act void for vagueness? Specifically, (a) does the failure of the state to publish a list of "career offenders" render the statute void in a case where labor union officials have been found to associate with a notorious organized crime leader and to conduct union affairs under his influence; and (b) is the term "inimical" unconstitutionally vague where it appears in a statute which is primarily aimed at preventing the infiltration of the casino industry by criminal elements, and where it has been interpreted to cover an association by which an organized crime figure influences the conduct of the affairs of a casino industry labor union?

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*Respondents.*

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## BRIEF OF THE NEW JERSEY CASINO CONTROL COMMISSION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

## Counter-Statement of the Case

Section 86 of the New Jersey Casino Control Act (the Act), N.J. Stat. Ann. 5:12-86 (West Supp. 1985), enumerates certain disqualifying criteria which apply to all persons who must be licensed or registered by the Casino Control Commission (the Commission) in connection with the ownership, financing, management and operation of casinos and casino hotels. Section 93 of the Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1985), also applies these criteria to "officers, agents or principal employees" of labor unions which represent or seek to represent persons licensed or registered by the Commission. Hotel and Restaurant Employees and Bartenders International Union Local 54 (Local 54), the union in which petitioners Frank Gerace and Frank Materio were officers, represents approximately 10,000 workers who are licensed or registered by the Commission, and thus its "officers, agents or principal employees" fall within the purview of section 86 and 93.

Of specific relevance here is section 86(f), N.J. Stat. Ann. 5:12-86(f) (West Supp. 1985), which disqualifies persons who are "career offender[s]" or "member[s] of a career offender cartel," and persons who are associated with a career offender or career offender cartel member "in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations." Section 86(f) defines a career offender as "any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State," and defines a career offender cartel as "any group

of persons who operate together as career offenders." The Commission found that Frank Gerace and Frank Materio were disqualified under section 86(f) because they were associated with certain career offenders, principally one Nicodemo Scarfo, in a manner inimical to the policies of the Act and to gaming operations.

Petitioners' Statement of the Case is in general agreement with the preceding recitation. However, the Commission takes this opportunity to write separately in order to correct certain inaccuracies or omissions found in petitioners' Statement of the Case.

First, petitioners would have this Court believe that the Commission randomly selected Nicodemo Scarfo for classification as a career offender. However, as stated in the Commission's opinion in this matter (Pa122 to Pa133),* Scarfo is a notorious hoodlum and is the head of the Philadelphia-South Jersey organized crime family formerly run by Angelo Bruno. Scarfo's criminal activities range as far back as 1950, and his association with "La Cosa Nostra" was thoroughly documented before the Commission. For that matter, petitioners acknowledged at the hearing before the Commission in 1982 that Scarfo was a career offender (Pet. for Writ of *Cert.* at 41; Pa122 to Pa123).

Second, petitioners fail to give a true picture of the evidence upon which the Commission concluded that their relationship to Scarfo disqualified them under section 86(f) from continuing to control the largest and most powerful

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* "Pa" refers to the petitioners' appendix accompanying their Petition for a Writ of *Certiorari*.

union in the New Jersey casino industry. At the hearing before the Commission, the Division of Gaming Enforcement of the New Jersey Attorney General's office (the Division) presented approximately 15 days of testimony, which the Commission discussed in an 80 page opinion (Pa113 to Pa244). The evidence presented before the Commission was also discussed at length by the New Jersey Superior Court, Appellate Division, *In re Hotel and Restaurant Employees and Bartenders International Union Local 54,* 203 N.J. Super. 297, 496 A. 2d 1111 (App. Div. 1985), certif. denied, —— N.J. ——, —— A. 2d —— (Sup. Ct. 1985), in its opinion upholding the Commission's determination. There would be no point in presenting another lengthy discussion of this evidence here.

For present purposes, the Commission merely notes that the evidence before it established, among other things, Scarfo's interest in Local 54, Scarfo's habit of following and being given advance notice of the union's activities, Scarfo's claim to control the union as part of his criminal organization, Scarfo's easy and frequent access to Gerace and Materio, the demonstrated personal allegiance of Gerace and Materio to Scarfo, the practice of Gerace and Materio of staffing the union's hierarchy with other Scarfo associates, and the practice of the union of doing business with persons and firms tied to Scarfo. The Commission thus found itself confronted with a situation in which Scarfo, a notorious hoodlum, exercises influence over the operations and dealings of the largest labor union in the casino industry. The Commission concluded that the situation before it was inimical to the policies of the Act and to gaming operations, stating:

> . . . once the influence of a career criminal such as Scarfo has been shown, we need not wait for its inevitable detrimental effect on the union and ultimately on the casino industry to become manifest before we can act. The fact of influence by a person such as Scarfo is inimical to the policy of the Act and to gaming operations. [Pa202].

In the view of the Commission, it cannot reasonably be contended that the "inimical" criterion in section 86(f) is not satisfied where a person such as Scarfo exercises influence over key casino industry union officials such as Gerace and Materio.

Gerace and Materio attack the finding of influence by pointing to several passages from the dissenting opinion of Commissioner Jacobson. Petitioners also note that the four-member Commission majority recognized that there was no direct evidence of influence. However, the Commission majority viewed the abundant record of circumstantial evidence before it as amply justifying its conclusion that Scarfo in fact influenced Gerace and Materio in the conduct of the affairs of Local 54.

The Appellate Division, upon its independent review of the evidence, concluded that "the Commission had a record replete with circumstantial evidence of Scarfo's influence over Gerace and Materio." *In re Local 54, supra,* 203 N.J. Super. at 321, 496 A. 2d at 1124. Unless this Court is to fashion a rule which excludes the consideration of circumstantial evidence, there is no basis to reconsider the finding of influence.

Third, petitioners mischaracterize the Appellate Division's holding on the question of whether section 86(f) is unconstitutionally vague. *In re Local 54, supra,* 203 N.J. Super. at 328-334, 496 A. 2d at 1128-1131. Petitioners suggest that the Appellate Division rejected their vagueness challenge by relying on factors which were not reasonably calculated to notify them that Scarfo was a career offender. However, the Appellate Division's discussion of vagueness followed its analyses of the sufficiency of the evidence question and of petitioners' First Amendment challenge. Accordingly, by the time the Appellate Division reached the merits of the vagueness challenge, it had already ruled that sufficient credible evidence existed in the record for the Commission to conclude that Scarfo exercised influence over Gerace and Materio and, in light of such influence, that the disqualification of Gerace and Materio did not infringe upon their First Amendment rights. Since Scarfo's influence had been demonstrated, it was clear to the Appellate Division that "Gerace and Materio cannot seriously contend that they were unaware that Scarfo was a career offender. . . ." *In re Local 54,* 203 N.J. Super. at 334, 496 A. 2d at 1131. Indeed, as previously noted, petitioners acknowledged Scarfo's organized crime membership during the Commission's hearing. Further, although Gerace invoked his Fifth Amendment privilege not to testify, Materio admitted that he had been aware of Scarfo's reputation as a gangster during the time of their association. In addition, petitioners' contribution to Scarfo's bail on a charge of a gangland-style murder, together with widespread publicity about Scarfo's illicit activities, must have placed petitioners on notice of his organized crime membership. Thus, the Appellate Division's conclusion is unavoidable.

Fourth, petitioners neglect to mention that Local 54 sought additional injunctive relief from the United States District Court for the District of New Jersey following the Commission order that Gerace and Materio cease functioning as Local 54 officials. After petitioners intervened in that action, the District Court denied preliminary injunctive relief and abstained from taking further action until completion of the state appellate litigation on the basis of this Court's decision in *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). *See Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Read*, 597 F. Supp. 1431 (D. N.J. 1984), aff'd mem., 772 F. 2d 895 (3 Cir. 1985).

In denying preliminary injunctive relief, the District Court found no reasonable liklihood of success on either the First Amendment or vagueness challenges to the Act. The United States Court of Appeals for the Third Circuit summarily agreed. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Read*, 772 F. 2d 895 (3 Cir. 1985). Thereafter, the petitioners' elected to present all their claims, state and federal, to the state courts, while the union itself sought to continue the federal action. Presently pending before the District Court are cross-motions for summary judgment and the motions of the Commission and the Division to dismiss on the basis of the preclusive effect of the state court decisions.

Last, the Commission and the Division are separate entities with specialized functions and duties within the scheme New Jersey has adopted to regulate its sensitive casino industry. N.J. Stat. Ann. 5:12-63 *et seq.* (West Supp. 1985; N.J. Stat. Ann. 5:12-76 *et seq.* (West Supp. 1985). Each agency operates independently of the other, and any characterization of the Division as the "enforcement arm" of the Commission is inaccurate.

## Summary of the Argument in Support of the Reasons for Denying the Writ

This case presents no special or important reasons for this Court to exercise its discretion to grant *certiorari,* because the New Jersey Supreme Court has not decided a federal question which in any way conflicts with the decision of another state court of last resort or of a federal court of appeals, and because the New Jersey state courts have not decided either an unsettled question of federal law or a federal question which in any way conflicts with this Court's decisions. U.S. Sup. Ct. Rule 17.1.

Although this case at one time was worthy of this Court's attention, *Brown* v. *Hotel and Restaurant Employees and Bartenders International Union Local 54,* —— U.S. ——, 104 S. Ct. 3179 (1984), it now turns solely on the factual determination that petitioners operated this critically important casino industry union under the influence of a notorious career criminal. This finding, which was sustained by the New Jersey appellate courts, disposes of the petitioners' First Amendment issue. There is simply no basis in any First Amendment case law to conclude that the Constitution guarantees the right of Gerace and Materio to operate a casino industry union under the influence of organized crime.

Contrary to petitioners' assertion, this case does not require this Court to further expound on its holding in *Roberts* v. *United States Jaycees,* —— U.S. ——, 104 S. Ct. 3244 (1984). The types of associations discussed in *Roberts* cannot, within reason, be stretched to grant First Amendment protection to an association by which an organized crime "boss" exercises influence over the manner in which

two union officials conduct the affairs of a local casino industry union. Moreover, since petitioners have conceded that the State has a compelling interest in preventing the infiltration of organized crime into casino gaming via labor unions (Pet. for Writ of *Cert.* at 37; Pa52), the constitutional balance is tipped in respondents' favor once the Commission's actual finding of influence is reached. The New Jersey appellate tribunals have borne their responsibility to review the record for sufficient credible evidence, and have concluded that influence has been established. Both the New Jersey courts and the federal courts have easily rejected petitioners' First Amendment contentions. Consequently, there is no First Amendment issue which requires this Court's attention.

Finally, there is no need for this Court to review the petitioners' due process challenge based on the alleged vagueness of N.J. Stat. Ann. 5:12-86(f) (West Supp. 1985). Given the finding of influence, petitioners' contention that they did not know that Scarfo was a career offender becomes simply untenable. Moreover, petitioners do not contend that they were unaware of Scarfo's widespread and well-publicized reputation as mob leader at the time they began their association and certainly thereafter. At the very best, they chose to accept the risk that their association would fall within the parameters of the Act. Similarly, any inexactitude in the standards set forth in section 86(f) is overcome by the statute's obvious applicability to labor union officials who conducted union affairs under the influence of organized crime.

Both the vagueness and First Amendment arguments raised by petitioners were analyzed and rejected by the New Jersey Superior Court, Appellate Division and by the

United States District Court for the District of New Jersey. The New Jersey Supreme Court determined that the decision of the Appellate Division did not merit its review, and the United States Court of Appeals upheld the decision of the District Court without opinion. It is thus clear that the issues presented have been rejected in both federal and state court and do not merit further review by this Court.

## *ARGUMENT*

### POINT I

**Certiorari should be denied where this Court is being asked to rule that the First Amendment guarantees the right of casino industry labor union officials to conduct union affairs under the influence of organized crime.**

The central issue presented to the New Jersey courts in this case was whether the record before the Commission supported the finding that Gerace and Materio conducted the affairs of Local 54 under the influence of organized crime. That issue had been analyzed at great length by the Commission, and was scrutinized with equal care by the Appellate Division. The Appellate Division's exhaustive review found ample support in the record for the Commission's finding of influence. The United States District Court likewise concluded that this finding was supported by the relevant evidence. *Hotel and Restaurant Empoyees etc.* v. *Read, supra,* 597 F. Supp. at 1447.

The Commission found that there was a "Scarfo effect" at work in Local 54, and that Gerace and Materio were

the means by which Scarfo worked his will over union affairs (Pa201 to Pa206). This finding has been judicially endorsed, and clearly there is no reason for this Court to once again perform the routine function of examining the thousands of pages of testimonial and documentary evidence to determine if that evidence supports the Commission's finding of influence.

The fact of influence being established, petitioners must necessarily be arguing that the Constitution guarantees their right to conduct the affairs of Local 54 under the influence of organized crime. Obviously, such an argument must be rejected, and in fact it has been rejected in both state and federal court.

It is true, as petitioners note, that this Court's decision in *Roberts, supra,* spoke of the constitutional protection which has been afforded to "certain intimate human relationships." *Roberts, supra,* —— U.S. at ——, 104 S. Ct. at 3249. However, the Court explained that the types of relationships which fall within this category are exemplified by "those that attend the creation and sustenance of a family—marriage . . ., childbirth . . ., the raising and education of children . . . and the cohabitation with one's relatives." *Id.* at 3250. Neither *Roberts* nor any other authority of which the Commission is aware raises to the level of First Amendment protection every relationship which may exist in society. More to the point, there is certainly no authority for placing under the umbrella of First Amendment protection an association by which an organized crime boss affects the operations of a casino industry labor union.

The Appellate Division clearly and correctly held that the Commission did not violate any First Amendment

rights of Gerace and Materio. In addition, the United States District Court, in an opinion upheld by the United States Court of Appeals, held that there was no likelihood of success on the merits of the claim that the Commission had violated the First Amendment rights of Gerace and Materio. *Hotel and Restaurant Employees and Bartenders* v. *Read, supra.*

In this regard, petitioners place great reliance on *Wilson* v. *Taylor*, 733 F. 2d 1539 (11 Cir. 1984). There the Court held it improper to discharge a police officer based solely on his dating the daughter of a "convicted felon reputed to be a key figure in organized crime in central Florida." *Id.* at 1540. However, the Court, on the record before it, concluded that there was no evidence that the police officer had been influenced by the girl's father. *Id.* at 1544-45, n.3. *See, Wilson* v. *Taylor*, 658 F. 2d 1021, 1030 (5 Cir. 1981).

In denying an application to preliminarily enjoin the enforcement of the Commission's order removing Gerace and Materio from union office, the District Court distinguished *Wilson* v. *Taylor, supra,* stating:

> Unlike this case, the ousted officer in *Wilson* faced no significant evidence of acting under the influence of an organized crime leader. The Fifth [*sic*] Circuit specifically suggested that the officer could have been fairly terminated for more extensive involvement with certain felons, indicted individuals, suspects or their relatives. 733 F. 2d at 1545, n.3. [*Read, supra,* 597 F. Supp. at 1447].

Petitioners also rely on a series of cases holding that a person's right to associate with a political group cannot be infringed unless there is specific intent to promote the

group's unlawful goals. *United States* v. *Robel*, 389 U.S. 258 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Scales* v. *United States*, 367 U.S. 203 (1961). According to petitioners, "[u]nder the principles of *Scales* and its progeny . . ., the punishment of an individual must be predicated upon *personal* guilt" (Emphasis in original) (Pet. for Writ of *Cert.* at 34).

Petitioners' reliance on these "specific intent" cases is misplaced for several reasons. First, *Scales*, *Elfbrandt* and *Robel* involved criminal statutes. Section 86(f) is civil in nature. Second, as petitioners' recognize Pet. for Writ of *Cert.* at 33), *Scales*, *Elfbrandt* and *Robel* were concerned with the protection of the right of political association. Section 86(f) concerns associations with persons and groups which by definition have as their purpose the pursuit of economic gain in an unlawful manner. The group with which Gerace and Materio are associated has no political purposes, and in fact has no legitimate purposes at all. Third, the statutes involved in *Scales*, *Elfbrandt* and *Robel* penalized associations with certain groups, including innocent associations. Section 86(f) applies only to associations which the Commission reasonably finds to be inimical to the policies of the Act and to gaming operations. Gerace and Materio were not found disqualified on the basis of an innocent association, but because they conduct the affairs of Local 54 under the influence of organized crime. In short, the very quality of the association between Gerace and Materio, on the one hand, and Scarfo and his cohorts, on the other, distinguishes this case from those specific intent cases cited in the petition. In fact, the District Court pointed out these very distinctions in its opinion and concluded that

any reliance on *Robel* and *Elfbrandt* was misplaced. *Read, supra,* 597 F. Supp. at 1447.

In summary, the Commission's action in requiring Geraee and Materio to cease acting as Local 54 officials did not infringe on any rights protected by the First Amendment. In addition, even if an infringement of First Amendment rights is assumed, such an infringement is justified if the State has a compelling state interest "that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts, supra,* —— U.S. at ——, 104 S. Ct. at 3252. Petitioners concede that New Jersey has a compelling state interest "in keeping organized crime out of unions representing casino employees." (Pet. for Writ of *Cert.* at 37). This Court, *Brown, supra,* —— U.S. at ——, 104 S. Ct. at 3190, as well as the Appellate Division, *In re Local 54,* 203 N.J. Super. at 328, 496 A. 2d at 1127, recognized the compelling nature of New Jersey's interest.

Petitioners appear to contend that, although there is a compelling state interest, the Commission selected means to uphold that interest which unnecessarily restrict constitutionally protected liberty. Specifically, petitioners, by relying on the specific intent cases, apparently are arguing that section 86(f) could have been applied to reach only those situations in which there is proof of both influence on, and illegal or other improper conduct by, the disqualified individuals.

As discussed above, the First Amendment does not impose a specific intent requirement on a statute such as section 86(f). The findings of actual influence by Scarfo over union affairs differentiates this case from one involv-

ing a mere social relationship. In this way, protected associations are not unduly infringed or deterred. Thus, the finding of influence in this non-expressional association case serves a function similar to that of the "shared intent" requirement in the political cases. Furthermore, the Commission in fact interpreted and applied that statute as narrowly as it could, consistent with the purposes of the Act and the fulfillment of the compelling state interest involved.

Obviously, the central purpose of the Act is to exclude unsuitable persons from participating, directly or indirectly, in the casino industry. *See also,* N.J. Stat. Ann. 5:12-64 (West Supp. 1985). This system is not merely intended to remove from the casino industry those persons who commit criminal or other improper acts while participating in that industry, but rather is basically prophylatic in nature. Many sections of the Act, including section 86(f), are designed to exclude from the privilege of participation in this normally illegal industry persons who present a danger to the integrity of the industry. The greatest danger to the integrity of the industry is organized crime infiltration, and it cannot reasonably be contended that the Act is designed to tolerate the presence in the industry of persons shown to be influenced by organized crime. As noted previously, the Commission ruled that "once the influence of a career criminal such as Scarfo has been shown, we need not wait for its inevitable detrimental effect on the Union and ultimately on the casino industry to become manifest before we can act" (Pa202). Viewed in the context of the Act as a whole, section 86(f) cannot be more narrowly applied and the compelling state interest here present cannot be more restrictively protected.

## POINT II

**Since N.J. Stat. Ann. 5:12-86(f) (West Supp. 1985) is clearly not void for vagueness, this Court need not exercise its discretionary jurisdiction to review this case.**

Gerace and Materio contend that section 86(f) is void for vagueness, both "on its face" and "as applied." Specifically, they contend that the term "inimical" is impermissibly vague on its face, and that the statute is vague as applied to them because they were not given notice that Scarfo was a "career offender" until the Commission's hearing in 1982. Both state and federal courts have examined these arguments, and have rejected them.

As the Appellate Division recognized, *In re Local 54*, 203 N.J. Super. at 329, 496 A. 2d at 1128, the degree of specificity which the Constitution demands depends upon the nature of the legislative provision in question. *Village of Hoffman Est.* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), reh'g den., 456 U.S. 950 (1982). Economic regulation is accorded greater leeway because its subject matter is often limited. *Ibid.*; *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 (1952); *United States* v. *Petrillo*, 332 U.S. 1 (1947); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, reh'g den., 372 U.S. 961 (1963). Both the Appellate Division and the United States District Court have recognized that "the allegedly vague portions of §86 are aimed primarily at economic activity." *In re Local 54*, 203 N.J. Super. at 329, 496 A. 2d at 1128; *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger* [*sic*],

536 F. Supp. 317, 337 (D. N.J. 1982), reversed, 709 F. 2d 815 (3 Cir. 1983), vacated *sub nom., Brown* v. *Hotel and Restaurant Employees and Bartenders International Union Local 54,* —— U.S. ——, 104 S. Ct. 3179 (1984).

Courts have also demonstrated a greater tolerance when dealing with civil rather than criminal enactments, because the consequences of imprecision are less severe. *Village of Hoffman Est.* v. *Flipside, Hoffman Est., supra* at 499-500; *Barenblatt* v. *United States,* 360 U.S. 109, 137, reh'g den., 361 U.S. 854 (1959), Black, J. dissenting; *Winters* v. *New York,* 333 U.S. 507, 515 (1948). Section 86(f) is a civil enactment, and its consequences are merely to disqualify individuals from participating in the Atlantic City casino industry.

Finally, if legislation inhibits the exercise of constitutionally protected rights, courts are apt to demand a considerably greater degree of exactitude in statutory language. *Village of Hoffman Est.* v. *Flipside, Hoffman Est., supra* at 500; *Papachristou* v. *City of Jacksonville, supra* at 156. In this case, both the Appellate Division and the District Court held that section 86(f) does not impair or inhibit the exercise of constitutionally protected freedoms. *In re Local 54,* 203 N.J. Super. at 329, 496 A. 2d at 1128; *Hotel and Restaurant Emp. etc.* v. *Danzinger* [*sic*], *supra,* 536 F. Supp. at 337-338.

In support of their vagueness challenge, petitioners point to this Court's opinion in *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), wherein the values which vague laws offend were articulated. As this Court stated

> First . . . we insist that laws give the person of ordinary intelligence a reasonable opportunity to

> know what is prohibited, so that he may act accordingly . . .
>
> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. [*Id.* at 108].

Petitioners' "as applied" argument addresses the first element since it is based on the contention that Gerace and Materio were unaware that Scarfo was a career offender. However, as the Commission sets forth at the beginning of its Counter-Statement of the Case, section 86(f) explicitly defines the terms "career offender" and "career offender cartel." Although petitioners concede as much (Pa44 to Pa45), they contend that "procedural due process requires that . . . they should have been given notice that Scarfo was, in fact, a career offender prior to the Division's quest for their disqualification" (Pet. for Writ of *Cert.* at 45).

The clear intent of section 86(f) was to prevent contact between the highly sensitive casino industry and those who use crime for their own economic gain. The evidence adduced at the hearing before the Commission clearly demonstrated Scarfo's underworld notoriety, which petitioners also concede (Pet. for Writ of *Cert.* at 41), thereby placing Scarfo at the center of the maelstorm which the New Jersey Legislature, through section 86(f), sought to prevent from wreaking havoc on the burgeoning casino industry. However, petitioners insist that they "were not reasonably apprised as a matter of common intelligence that Scarfo was to be considered a career offender for the purposes of the Act" (Pet. for Writ of *Cert.* at 45).

The petitioners' claimed "lack of fair warning" (Pet. for Writ of *Cert.* at 41) does not prevent their disqualification under section 86(f) because their "as applied" vagueness challenge must be considered in light of the facts of this case. *United States* v. *Mazurie*, 419 U.S. 544, 551 (1975). Under such circumstances, the Appellate Division had no difficulty in concluding that the fact of Scarfo's influence over petitioners, particularly in light of their willingness to contribute major personal assets towards a bail fund for the release of Scarfo while under indictment for a highly publicized gangland-style murder, was more than adequate to reasonably apprise them that their close contact with Scarfo was the "kind of conduct which is likely to result in disqualification." *In re Local 54*, 203 N.J. Super. at 333, 496 A. 2d at 1130-1131. In light of the Appellate Division's affirmance of the Commission's findings about the relationship of Gerace and Materio to the notorious Scarfo, their "as applied" argument is absurd.

In addition, the contention that the Commission should have utilized the "exclusion list" authorized by N.J. Stat. Ann. 5:12-71 (West Supp. 1985) to give notice that Scarfo was a career offender is equally meritless. The exclusion list is not a list of all career offenders. Indeed, there are many persons on the list who are not career offenders at all, but who have been convicted of cheating at casino games. The list is maintained for the use of casino operators and law enforcement officials, in order to exclude certain undesirable persons from casino hotels, and was certainly not intended to notify the public of the identity of all career offenders.

Petitioners "facial" vagueness argument is that the term "inimical" in section 86(f) is unconstitutionally vague. Viewed within the context of the Casino Control Act, it is clear that section 86(f) is directed at associations which directly or indirectly undermine the integrity of the casino industry, *i.e.*, associations formed for illegal purposes or associations which permit corrupt influences to seep into the industry. In addition, it is clear beyond question that conducting the affairs of the largest and most significant casino industry labor union under the influence of organized crime is "inimical" within the meaning of section 86(f). Even if the outermost boundries of section 86(f) may not be delineated with exactitude, any such uncertainty is irrelevant here since the conduct of Gerace and Materio falls squarely within the statute's proscription. *Village of Hoffman Est.* v. *Flipside, Hoffman Est., supra.* at 495.

The Appellate Division and the United States District Court have upheld section 86(f) as against the vagueness arguments advanced by Gerace and Materio. The New Jersey Supreme Court and the Court of Appeals summarily rejected the requests to review the decisions of the respective lower courts. There is no reason for this Court to review these issues again.

## CONCLUSION

Petitioners are asking this Court to rule (1) that they have a First Amendment right to operate a casino industry labor union under the influence of organized crime, (2) that they were deprived of due process because they were not informed by New Jersey that a notorious hoodlum who utilized them to work his will over union affairs was a "career offender," and (3) that they were denied due process because they could not be expected to know that infiltration of a casino industry labor union by organized crime would be considered "inimical" to the policies of the Casino Control Act. The mere statement of petitioners' arguments reveals their complete lack of merit, and the Commission respectfully submits that those arguments provide no basis for this Court to exercise its discretionary jurisdiction by granting the petition.

Respectfully submitted,

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Dated: February 28, 1986

No. 85-1308

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

FRANK GERACE and FRANK MATERIO,

*Petitioners,*

*v.*

STATE OF NEW JERSEY, CASINO CONTROL COMMISSION AND STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## RESPONDENT'S BRIEF IN OPPOSITION

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## Questions Presented

1. Whether a State violates the First Amendment by disqualifying and removing from office two officials of a casino-industry labor organization found to have operated their union under the influence of organized crime.

2. Whether a state statute which provides for the disqualification and exclusion from the casino industry of persons who associate with organized crime in a manner inimical to gaming policy is vague on its face or as applied to two casino union leaders found to have operated their union under the influence of organized crime.

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No. 85-1308

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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FRANK GERACE and FRANK MATERIO,

*Petitioners,*

*v.*

STATE OF NEW JERSEY, CASINO CONTROL COMMISSION AND STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

---

## RESPONDENT'S BRIEF IN OPPOSITION

## Opinions Below

The opinion of the Superior Court of New Jersey, Appellate Division, is reported. *In re Hotel and Restaurant Employees and Bartenders International Union Local 54*, 203 N.J. Super. 297, 496 A. 2d 1111 (App. Div. 1985).

Two additional decisions exist in related proceedings which are not referred to by the Petitioners. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Read*, 597 F. Supp. 1431 (D.N.J. 1984), is a decision of the District Court subsequent to this Court's remand in *Brown* v. *Hotel and Restaurant Employees and Bartenders International Union Local 54*, 104 S.Ct. 3179 (1984). The District Court's decision was affirmed without opinion by the United States Court of Appeals for the Third Circuit. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Read*, 772 F. 2d 895 (3d Cir. 1985) (mem.).

## Statement of the Case

In *Brown, supra*, 104 S.Ct. at 3182-3185, this Court vindicated the right of the State of New Jersey to police its casino gaming industry by upholding, against a preemption challenge, the application to the Petitioners of the disqualification criteria of N.J. Stat. Ann. §5:12-86(f) (Supp. 1985-1986), as part of a comprehensive statutory scheme "designed to extend strict State regulation to all persons . . . related to the operation of licensed casino enterprises," §5:12-1(b)(6), toward the end of "insur[ing], so far as practicable, the exclusion from participation [in gaming] of persons with known criminal records,

habits or associations," §5:12-1(b)(7). The Court's decision was based upon the State's compelling interest in protecting its nascent casino industry against the infiltration of organized crime, particularly through the avenues provided by labor racketeering and related corruption. 104 S.Ct. at 3182-3184, 3190. Different grounds are now urged to invalidate the application of Section 86(f) to the Petitioners.

By way of background, Hotel and Restaurant Employees and Bartenders International Union Local 54 ("Local 54"), is an unincorporated labor organization which represents 8,000 casino hotel employees. Petitioner Frank Gerace was the union's president, and Petitioner Frank Materio was a grievance manager. In 1978, Local 54 and its officials began filing with the Casino Control Commission ("Commission") the annual registration statement required by Section 93(a) of the Act. Pursuant to Sections 76 and 94(a), the Division of Gaming Enforcement ("Division") thereafter conducted an investigation of Local 54 and its officials and reported to the Commission that, in its view, Gerace and Materio were disqualified under the criteria of Section 86. See 104 S.Ct. at 3184.

Following a hearing in 1982, the Commission issued an opinion holding Gerace and Materio disqualified under §5:12-86(f), which bars those adjudicated to be "an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of [the Casino Control Act] and to gaming operations." The basis for this decision was the Commission's finding that the Petitioners had operated Local 54 under the influence of Nicodemo Scarfo, a notorious career criminal and reign-

ing head of the organized crime "family" dominant in the Philadelphia-Atlantic City region. Pet. 122a-130a, 199a-206a. More specifically, the Commission found that the Petitioners had maintained a knowing, purposeful, long-standing and continuing association with Scarfo; that the Petitioners had contributed cash and property to a bail fund used to secure the release of Scarfo and his codefendants following their arrest for a widely-publicized homicide; that the Petitioners had actively participated in the appointment of persons allied with Scarfo to positions of authority within Local 54; and that the Petitioners consistently funneled union business to persons or firms connected to Scarfo. Pet. 133a-180a, 202a-206a.

On an appeal from the Commission's decision, the New Jersey Superior Court, Appellate Division, thoroughly canvassed the record supporting the agency's disqualification of Gerace and Materio, and concluded:

> [T]he Commission had a record replete with circumstantial evidence of Scarfo's influence over Gerace and Materio. The evidence manifests itself in the union officials' personal relationship with Scarfo as well as in their business relationships with Scarfo associates. The sheer number of ties to Scarfo renders incredible an innocent explanation. . . . Considering the record as a whole, we conclude that the findings of fact are supported by sufficient credible evidence. [*In re Local 54, supra,* 203 N.J. Super. at 321, 496 A. 2d at 1124; Pet. 38a-39a].

Disposing of the argument that the Petitioners' disqualification violated their freedom of association as embodied in the First Amendment, the court found the relationships

between Gerace, Materio and Scarfo to be quite dissimilar from the types of intimate human relationships previously held deserving of constitutional protection. 203 N.J. Super. at 321-326, 496 A. 2d at 1124-1126; Pet. 39a-51a. Solely in the alternative, the court ruled that any associational infringement resulting from the disqualification of Gerace and Materio was justified by the State's compelling interest in protecting its casino industry from the influence of organized crime. 203 N.J. Super. at 326-328, 496 A. 2d at 1126-1127; Pet. 51a-56a. From the decision of the Supreme Court of New Jersey denying certification and dismissing the Petitioners' appeal, Pet. 1a-2a, certiorari is presently sought.

## REASONS WHY THE WRIT SHOULD BE DENIED

### 1. The First Amendment question raised in the Petition is not presented by the record or the decision below. The only First Amendment question presented by the record is insubstantial, and was correctly decided below.

The First Amendment question raised and repeatedly argued in the Petition is whether a "social" relationship between the Petitioners and a high-ranking member of organized crime falls within the constitutionally protected "freedom of intimate association" discussed by this Court in *Roberts* v. *United States Jaycees*, 104 S. Ct. 3244, 3249-3251 (1984). The record in this case, however, discloses that Gerace and Materio were not disqualified for maintaining a social association with Scarfo, but for conducting the affairs of their union under the influence of Scarfo

and his organized crime interests. Pet. 199a-202a; *In re Local 54, supra,* 203 N.J. Super. at 321, 496 A. 2d at 1124; Pet. 38a-39a. Such criminal associations are a far cry from the type of intimate familial attachments deserving of the greatest constitutional protection and, on the spectrum of human relationships referred to in *Roberts,* more closely resemble the commercial contacts which merit little or no constitutional shelter. See 104 S.Ct. at 3249-3251. See also *Read, supra,* 597 F. Supp. at 1446-1448; *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317, 336 (D.N.J. 1982), *rev'd,* 709 F. 2d 815 (3d Cir. 1983), *vacated,* 104 S.Ct. 3179 (1984). Although the Petitioners seemingly seek to have this Court relitigate the validity of the Commission's finding of influence,* Pet. 5-16, the Court does not grant certiorari to review evidence and discuss specific facts, *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). In effect, neither the record nor the decision below will support a determination of the First Amendment question raised in the Petition.

The only issue which is presented by this record, whether the Petitioners' operation of Local 54 under the influence of organized crime would properly disqualify them from participation in New Jersey's casino industry, was actually conceded by the Petitioners below. *In re Local 54,* 203 N.J.

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* In so doing, the Petitioners continue to rely upon evidence which is outside the record of this proceeding, in flagrant disregard of this Court's procedures. See Pet. 7,8 (referring to testimony of a state police officer); Pet. 9 (detailing the results of an alleged polygraph examination taken by one of the Petitioners after the conclusion of the Commission hearing). See *In re Local 54, supra,* 203 N.J. Super. at 320n.5, 496 A. 2d at 1123n.5; Pet. 37an.5.

Super. at 317, 496 A. 2d at 1122; Pet. 29a-30a. That concession is consistent with the prevailing authority, which is unanimous in affirming that associations which negatively affect an individual's job performance or fitness to participate in a highly-regulated industry may constitutionally form the basis for exclusionary action by the State. *See, e.g., Wilson* v. *Taylor,* 733 F. 2d 1539, 1544n.3 (11th Cir. 1984) (refusing to hold that law enforcement officer could never be fired because of associations with certain felons, indicted individuals, suspects or their relatives); *Lewitus* v. *Colwell,* 479 F. Supp. 439, 444-445 (D. Md. 1979) (upholding denial of horse racing owner's license based upon applicant's association with individual involved in previous racing violations); *Fisher* v. *Snyder,* 346 F. Supp. 396, 401 (D. Neb. 1972), *aff'd,* 476 F. 2d 375 (8th Cir. 1973) (acknowledging that associational conduct which interfered with teacher's work could properly be made subject of discipline by State); *Durham* v. *Louisiana State Racing Com'n.,* 458 So. 2d 1292, 1294-1295 (La. 1985) (upholding suspension of wife's horseracing licenses based on husband's disqualification and financial interdependence of spouses); *Spilotro* v. *State,* 99 Nev. 187, 661 P. 2d 467, 470-471 (1983) (holding that individual may be excluded from casinos based upon criminal associations); *Morrisette* v. *Dilworth,* 59 N.Y. 2d 449, 451-453, 452 N.E. 2d 1222, 1223-1224, 465 N.Y.S. 2d 894, 895-896 (1983) (affirming validity of police department regulation prohibiting association or fraternization with known felons).

This Court itself has had prior occasion to consider questions analogous to those presented herein. In *In re Application of Boardwalk Regency Corp. for a Casino License,* 90 N.J. 361, 447 A. 2d 1335 (1982), *aff'g* 180 N.J.

Super. 324, 434 A. 2d 1111 (App. Div. 1981), the courts of New Jersey upheld a decision excluding two individuals from the casino industry based upon their associations with a reputed organized crime figure and the impact of such associations on the policies intended to be served by gaming regulation. The disqualified individuals subsequently took an appeal to this Court, arguing that they could not constitutionally be penalized for lawful and proper business transactions and that such a result represented an impermissible finding of guilt by association. *Perlman* v. *Attorney General,* Docket No. 82-691, Jurisdictional Statement at i-ii, 3-10. After the filing of responding and reply briefs, the appeal was dismissed by this Court "for want of a substantial federal question." *Perlman* v. *Attorney General,* 459 U.S. 1081 (1982).

Most recently, this Court denied certiorari in *Baron* v. *Meloni,* 106 S.Ct. 798 (1986). As disclosed by the opinions below, the courts therein upheld, over a First Amendment challenge, the dismissal of a deputy sheriff for carrying on an association with the wife of a reputed organized crime member, the courts recognizing the State's concern with preventing the fact or appearance of corruption within its police force. *Baron* v. *Meloni,* 556 F. Supp. 796 (W.D.N.Y.), *remanded mem.,* 742 F. 2d 1439 (2d Cir. 1983), *on remand,* 602 F. Supp. 614 (W.D.N.Y.), *aff'd mem.,* 779 F. 2d 36 (2d Cir. 1985), *cert. denied,* 106 S.Ct. 798 (1986).

In the present matter, this Court has already recognized that New Jersey has a compelling interest in protecting its casino industry from organized criminal infiltration, corruption and racketeering, through the labor organizations and officials involved in gaming. *Brown, supra,* 104

S.Ct. at 3182-3184, 3190. That interest clearly warrants and justifies the disqualification and removal from office in a casino industry union of officials found to have operated that union under the influence of organized crime. The Petitioners' suggestion that the State could not constitutionally act against them until they had committed some specific act of misconduct, Pet. 37-40, fails to recognize that the purpose of the Casino Control Act—like so many other licensing and regulatory standards in sensitive fields—is prophylactic, designed to *prevent* corruption, not merely to react to illicit activity after the damage has been done. See *Trade Waste Mgt. Assn., Inc.* v. *Hughey*, 780 F. 2d 221, 239 (3d Cir. 1985) (State has compelling interest in preventing *risk* of organized criminal infiltration of sensitive industry). There is no foundation, in the First Amendment or elsewhere, for the illogical theory that persons involved in the casino industry are entitled to commit one free crime before the State may take exclusionary action.

In this connection, the fact that the Petitioners are *union officials* is legally irrelevant to the analysis or outcome herein. In *Brown, supra,* this Court acknowledged that the disqualification standards of Section 86(f) could be applied to leaders of casino labor organizations to the same extent as those standards are applied to all other casino industry applicants, licensees and registrants. 104 S.Ct. at 3183-3184, 3190. Inasmuch as this Court has already ruled that criminal associations may constitutionally disqualify casino license applicants from the gaming industry, *Perlman* v. *Attorney General, supra,* and because union officials' First Amendment rights of association are obviously no greater than any other individual's, the Peti-

tioners' claims are no more substantial than those previously rejected. The Petitioners patently lack standing to assert any rights on behalf of their union or its members, see Pet. 22, 39-40. Since, unlike the Petitioners, Local 54 itself chose to litigate its federal claims in federal rather than state court, see *Read, supra,* 597 F. Supp. at 1445, 1454, neither the Petitioners nor the union should be heard to advance the union's interests on review of the state court's decision.

**2. The argument that N.J. Stat. Ann. §5:12-86(f) is vague on its face or as applied to the Petitioners is insubstantial and does not merit this Court's review.**

At the outset, the Respondent questions whether the Petitioners' mere assertion, without more, that the New Jersey courts erred in rejecting their vagueness challenge, Pet. 40-55, is sufficient in itself to justify this Court's review. In *Perlman* v. *Attorney General, supra,* 459 U.S. at 1081, the Court dismissed the appeal of two casino license applicants, disqualified because of their organized crime associations, who argued that the Casino Control Act's requirement of good character was vague as applied to them. See *Perlman* v. *Attorney General,* Docket No. 82-91, Jurisdictional Statement at ii, 10-11. Obviously, if this Court were required to determine for itself whether every section of the Casino Control Act or every other licensing statute in America was vague on its face or as applied to every individual applicant rejected thereunder, little time would remain for other matters.

On the merits, the judgment below is completely in accord with the governing decisions of this Court. N.J.

Stat. Ann. §5:12-86(f) (Supp. 1985-1986), under which the Petitioners were disqualified, is a non-criminal economic regulation designed not to punish offenders, but to protect New Jersey's casino industry. *Brown, supra,* 104 S.Ct. at 3182-3184, 3190; *In re Local 54, supra,* 203 N.J. Super. at 329, 348-349, 496 A. 2d at 1128, 1138-1139; Pet. 58a-59a, 106a-107a. As such, and because the statute does not infringe on constitutionally protected interests, *Hotel and Restaurant Employees* v. *Danzinger, supra,* 536 F. Supp. at 335-336; *In re Local 54, supra,* 203 N.J. Super. at 329, 496 A. 2d at 1128; Pet. 59a, Section 86(f) is subject to the vagueness test set forth in *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 489 (1982).

That test mandates that to succeed in a facial vagueness challenge to a statute, the complainant must demonstrate that the law is impermissibly vague in all of its applications. 455 U.S. at 497. Section 86 (f), however, as construed by the Commission in this and prior administrative decisions, clearly provides an objective standard which is sufficiently definite so as to be capable of some reasonable and valid application. See *In re Local 54, supra,* 203 N.J. Super. at 330-332, 496 A. 2d at 1128-1130; Pet. 59a-66a; *Danzinger, supra,* 536 F. Supp. at 336-338. The Petitioners' facial vagueness argument was thus correctly rejected below, and provides no basis for this Court's further review.

The Petitioners' assertions that Section 86(f) is vague as applied to them are no more compelling. That statute is a civil licensing provision which does not prohibit or render any conduct unlawful; it merely provides a standard

for assessing whether an individual has a disqualifying status, *i.e.* an association with organized crime inimical to gaming. Since that disqualifying status can exist without regard to the individual's foreknowlege, all of the Petitioners' "fair notice" arguments are legally irrelevant, see *Trade Waste, supra*, 780 F. 2d at 235, the only issue being whether the Commission's disqualification of Gerace and Materio represents an arbitrary application of the statute. The Petitioners' assertions fail on this score as well.

As noted earlier, the Petitioners were found to have operated their casino-industry labor union under the influence of organized crime. Such activity self-evidently constitutes *core conduct*, clearly within the legitimate sweep of Section 86 (f) and flagrantly inimical to state gaming and regulatory policy. Indeed, the Petitioners conceded as much below. *In re Local 54, supra*, 203 N.J. Super. at 317, 496 A. 2d at 1122; Pet. 30a. The familiar principle that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), is sufficient in itself to dispose of the Petitioners' claims.

## CONCLUSION

**For the reasons set forth herein, the petition for a writ of certiorari should be denied.**

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